TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]102

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RAYMOND BROS.-CLARK COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petition for Certiorari Filed August 5, 1922.
Certiorari and Return Filed December 6, 1922.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 535.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RAYMOND BROS.-CLARK COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May term, 1922, of said court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, circuit judges, and the Honorable Jacob Trieber, district judge.

Attest:

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-third day of April, A. D. 1921, a petition to review an order of the Federal Trade Commission was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and thereafter on the eighth day of June, A. D. 1921, a transcript of proceedings before the Federal Trade Commission was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Raymond Bros.-Clark Company was petitioner, and the Federal Trade Commission was respondent, which said petition to review and transcript of proceedings as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, are in the words and figures following, to wit:

1 ORIGINAL PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed April 23, 1921.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

RAYMOND BROS.-CLARK COMPANY, PETITIONER,
vs.
FEDERAL TRADE COMMISSION, RESPONDENT.

To the Honorable Judges of said Court:

Your petitioner, Raymond Bros.-Clark Company, respectfully represent that it is now and has been for many years preceding the filing of this petition a corporation organized and existing under the laws of the State of Nebraska with its principal place of business in the city of Lincoln, in the State of Nebraska, and is now and has been for many years continuously engaged in business as a wholesale grocer purchasing and assembling groceries and food products for sale and distribution to merchants engaged in the sale of such products at retail to consumers.

The Federal Trade Commission on or about the 5th day of January, 1920, filed and exhibited its complaint before the Federal Trade Commission stating its charges in that respect against your peti-

tioner and containing a notice of hearing in the manner and form prescribed by law, and which complaint is in words and figures following, to wit:

Complaint of the Federal Trade Commission.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it that Raymond Bros.-Clark Co., hereinafter referred to as the respondent, has been and is violating the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would
2 be to the interest of the public, issues this complaint, stating its charges in that respect, upon information and belief as follows:

Paragraph One. That the Basket Stores Co. is a corporation organized under the laws of Nebraska, having its principal place of business at Omaha, in the State of Nebraska, and also having branch stores and places of business at other places, including Lincoln, in said State of Nebraska; that the said company is engaged in the business of buying and selling in wholesale quantities groceries and food products such as are bought and sold generally by persons, firms, and corporations engaged in the business generally known as that of a wholesale grocer; that in the course of its said business the Basket Stores Co. purchases and products dealt in by it in the various States and Territories of the United States and transports the same through other States and Territories to the cities of Omaha and Lincoln, in the State of Nebraska, where such commodities are resold, and there is continually and has been at all times hereafter mentioned a constant current of trade and commerce in the commodities so purchased by the said Basket Stores C, between and among the various States and Territories of the United States; that the said Basket Stores Co. is in active competition with the respondent, Raymond Bros.-Clark Co.

Paragraph Two. That the respondent, Raymond Bros.-Clark Co., is a corporation organized under the laws of the State of Nebraska, having its principal place of business at Lincoln, in the said State, and is engaged in the business known generally as that of wholesale grocer; that the said respondent purchases the commodities dealt in by it in the various States and Territories of the United States and transports the same through other States and Territories to said city of Lincoln, in said State of Nebraska.

Paragraph Three. That the T. A. Snider Preserve Co. is a corporation manufacturing certain food products which are sold and transported in the various States and Territories of the United States.

Paragraph Four. That in or about the month of September, 1918, the said T. A. Snider Preserve Co. caused to be shipped and trans-

ported from Marion, in the State Indiana, to the city of Lincoln, in the State of Nebraska, certain products manufactured by it
3 which had been sold to and were intended for delivery to the said Basket Stores Co. at said city of Lincoln, Nebraska; that the said products were shipped and transported in a car which also contained certain products of the said T. A. Snider Preserve Co. which had been ordered by and were intended for delivery to the respondent at said Lincoln, Nebraska; that when the said car arrived the respondent took possession of said products intended for delivery to said Basket Stores Co. and declined to allow delivery of the same to the said Basket Co. and said T. A. Snider Preserve Co. paid to the respondent the sum of one hundred ($100) dollars and for a jobber's profit upon the sale of said goods; that thereafter the said respondent at divers times attempted to coerce and compel the said T. A. Snider Preserve Co. to refuse to recognize said Basket Stores Co. as a jobber and to refuse to sell to said Basket Stores Co. at prices regularly charged to recognized jobbers, and at divers times has represented to said T. A. Snider Preserve Co. that the said Basket Stores Co. was not a legitimate jobber and had never been such but was engaged in the retail grocery business, and said respondent has at divers times since the month of September, 1918, threatened to withdraw its patronage from said T. A. Snider Preserve Co. if said company sold to or recognized said Basket Stores Co. as a jobber and refused to pay to said respondent said sum of one hundred dollars ($100) aforesaid; that the purpose and effect of the aforesaid acts and practices of the respondent were and are to cut off the supplies of its said competitor, said Basket Stores Co., to stifle, suppress and prevent competition between respondent and said Basket Stores Co. and to interfere with the right of said Basket Stores Co. and said T. A. Snider Preserve Co. paid to with each other in interstate commerce upon terms mutually agreed upon between them.

Now, therefore, notice is hereby given you, that said respondent, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the city of Washington, D. C., on the 5th day of January, A. D. 1920, at 10.30 o'clock in the [after] of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint; and

You will further take notice that within thirty days after
4 the service of this complaint you are required to file with the commission an answer in conformity with Rule III of the rules of practice before the commission.

In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official seal to be affixed hereto, at the city of Washington, D. C., this 28th day of October, A. D. 1919.

By the Commission.

Your petitioner further represents that within the time fixed by the order of said Federal Trade Commission and the notice issued in conformity therewith it appeared and presented its showing of cause, in words and figures following, to wit:

Answer of the Raymond Bros.-Clark Company.

Comes now Raymond Bros.-Clark Co., and appearing to the charges of the complaint in the above-entitled matter and answering the same, as required by order of the commissioners made in the city of Washington, D. C., on the 28th day of October, 1919, and pursuant to notice served on the 20th day of November, 1919, respectfully shows:

Paragraph One. The respondent admits, upon information and belief, that Basket Stores Company is a corporation organized under the laws of the State of Nebraska, with its principal place of business in the city of Omaha, in the State of Nebraska, and having branch stores and places of business in other cities, including Lincoln, in the State of Nebraska. Respondent also admits, upon information and belief, that said Basket Stores Company purchased some of the products dealt in by it in other States and Territories than the State of Nebraska, and that such products are and were transported from such other States and Territories into the State of Nebraska, but the extent of such purchases and whether or not such comprise all of the products so dealt in by the Basket Stores Company, and as to whether or not, on account thereof, there is and was a constant current of trade and commerce in such commodities so purchased between and among the various States and Territories of the United States respondent is without knowledge.

Paragraph Two. Respondent specifically denies that the said Basket Stores Company was, during the period of time covered by the complaint, or is now or ever has been engaged in buying and selling in wholesale quantities groceries and food products such as are bought and sold generally by persons, firms, and corporations engaged in the business generally known as a wholesale grocery business. Respondent further specially denies that the Basket Stores Company is now or ever was in active competition with respondent.

Paragraph Three. Respondent admits the correctness of the allegations contained in paragraphs two and three of the complaint.

Paragraph Four. Respondent admits that in or about the month of September, 1918, T. A. Snider Preserve Company caused to be shipped and transported to Marion, in the State of Indiana, to the city of Lincoln, in the State of Nebraska, certain products manufactured by it, hereinafter more particularly detailed, which respondent is informed and believes had been sold by said T. A. Snider Preserve Company to said Basket Stores Company at said city of Lincoln, Nebraska, and that said products were intended by said T. A. Snider Preserve Company to be delivered to said Basket

Stores Company and to be shipped and transported in a car which also contained certain products of said T. A. Snider Preserve Company, which had been by it sold to respondent, as hereinafter particularly detailed. Respondent further admits that it has represented to T. A. Snider Preserve Company; that the said Basket Stores Company was not a legitimate jobber and had never been such, but was always engaged in the retail grocery business; and respondent alleges the fact to be that said Basket Stores Company is now and has at all times been engaged in the retail grocery business, selling its merchandise in the retail quantities to consumers, and is not now nor has it ever been engaged in the wholesale grocery business.

Paragraph Five. Respondent specifically denies that at the time it received the car of products of the said T. A. Snider Preserve Company containing a shipment sold to Basket Stores Company it withheld delivery to said Basket Stores Company or demanded, as a condition upon which delivery should be made, that it should be paid the sum of one hundred ($100.00) dollars or any other sum whatever. Respondent further answering says that as soon as practicable, upon the receipt by it of the car of products containing shipment intended for different companies hereinafter detailed, including Basket Stores Company, it notified each of said companies of the arrival of the shipment and made delivery to
6 Basket Stores Company without imposing any condition whatsoever and without in any manner discriminating against said Basket Stores Company in favor of any other company interested in the products contained in said car.

Paragraph Six. Defendant specifically denies that it from time to time attempted to coerce and compel said T. A. Snider Preserve Company to refuse to recognize the said Basket Stores Company as a jobber and to refuse to sell to said Basket Stores Company at prices regularly charged to recognized jobbers. In this connection, however, respondent admits that it has represented to said T. A. Snider Preserve Company that said Basket Stores Company was not a legitimate jobber and had never been such and was engaged in the retail grocery business. Respondent alleges the fact to be that such representations so made by it were and are true.

Paragraph Seven. Respondent for further answer says that in or about September, 1919, T. A. Snider Preserve Company sold to it the following items and quantities of its products, to wit:

Cases.	Size.	Products.	Dozen.
200	16 oz.	Catsup	400
100	8 "	"	200
5	Gallons	"	30
25	16 oz.	Chili Sauce	50
10	8 oz.	" "	20
10	16 oz.	Salad Dress.	20
5	Gallons	" "	30

That at approximately the same time the said T. A. Snider Preserve Company sold to the following named jobbers engaged in buying groceries and provisions, storing and warehousing the same for sale and distribution to retail dealers engaged in selling to consumers the following items and quantities of its products, to wit:

H. P. Lau Company,
Lincoln, Nebraska.

Cans.	Size.	Products.	Dozen.
100	16 oz	Catsup	200
25	8 "	"	50

7 Grainger Bros. Company,
Lincoln, Nebraska.

Cases.	Size.	Products.	Dozen.
125	16 oz.	Catsup	250
25	8 "	"	50
10	16 "	Chili sauce	20
10	6 "	Oyster CS	20

Bradley-Hughey Company.
Nebraska City, Nebr

Cases.	Size.	Products.	Dozen.
75	16 oz.	Catsup	150
25	8 "	A	50

Blue Valley Mercantile Co.
Beatrice, Nebr.

Cases.	Size.	Products.	Dozen.
85	16 oz.	Catsup	170
15	8 "	"	30

That each jobber above named is engaged in the merchandising business with its warehouse and principal place of business located in the cities following the name. Each of said jobbers carries on the business usually carried on as wholesale grocer and in the manner generally employed by such wholesaler in the United States, and each is in direct and constant competition with each other and with respondent and that none are engaged in the business of retail dealers selling groceries and provisions at retail to consumers and none are in competition with the said Basket Stores Company. That all purchases so made by each of said jobbers from the said T. A. Snider Preserve Company were made for the purpose of resale to retail dealers in groceries, engaged in direct competition with the Basket Stores Company and other retail grocers carrying on such business within the territory tributary to Lincoln, Nebraska.

Respondent further says that at about the same time the said T. A. Snider Preserve Company sold to said Basket Stores Company, of its products, the following items and quantities:

8 Basket Stores Company, Lincoln, Nebr.

Cases.	Size.	Products.	Dozen.
75	16 oz.	Chili Sauce	150
25	8 oz.	" "	50
100	———	Soup	—
25	16 oz.	Salad Dressing	50
25	8 oz.	" "	50
25	16 oz.	Oyster C. S.	50
25	8 oz.	" " "	50

That the products so sold by said T. A. Snider Preserve Company were by said Basket Stores Company purchased for sale at retail to consumers in the cities of Lincoln and Omaha and in direct competition with other retail grocers in the cities of Lincoln and Omaha, in the State of Nebraska.

Respondent for further answer says that it is now and was at the times covered by the allegations in the complaint engaged in the wholesale grocery business purchasing groceries and provisions of all kinds from the producer and manufacturer, collecting the same in its warehouses for distribution to retail grocers engaged in selling to consumers; that its place of business is in Lincoln, Nebraska, and it sells and distributes to retail dealers in the territory naturally tributary to Lincoln, Nebraska; that as a wholesaler of groceries respondent buys in large quantities, taking into consideration the demand of all retail dealers within its territory to meet the demands of consumers; that for its compensation in the handling of merchandise and service rendered it charges a reasonable profit, selling and offering to supply all retail dealers within its territory merchandise of all kinds handled by it and upon identical terms; that respondent does not compete with retail dealers to whom it sells merchandise nor to any other retail dealers in the sale and distribution of groceries and provisions to consumers.

Respondent further shows that the products of the said T. A. Snider Preserve Company are of such a character that for the economical handling and distribution to consumers the wholesale dealer is an essential factor; that the quantities required by the individual dealer could not be distributed with economy because of increased shipping cost attaching the shipment at less than carload rates and the increased selling, accounting, and collecting costs due to sales of a single line direct to the retailer. Respondent further says that to meet its expense in purchasing, selling, and distributing the products of the said T. A. Snider Preserve Company to
9 retailers it charges a profit, and such profit has at all times been a reasonable and just profit and only such as was and is justly and reasonably compensatory, and that it was the intention of respondent, at the time it purchased the products above listed, to sell the same to its consumers, to wit, retail dealers in the cities of Lincoln and Omaha, Nebraska, and throughout its territory; that the said T. A. Snider Preserve Company knew it was the purpose of

respondent in purchasing such products to resell the same in quantities usually purchased by retailers engaged in selling the same to consumers in the cities of Lincoln and Omaha and other cities and towns within the territory naturally tributary to the city of Lincoln as a jobbing center; that the quantities purchased by respondent contemplated its usually reasonable and ordinary demands for supplying its trade in the cities of Lincoln and Omaha and within other cities and towns within its territory.

That the said Basket Stores Company was at the times covered by the complaint and is now a corporation and engaged in the operation of retail stores in the cities of Omaha and Lincoln, Nebraska, and had at such times and now have several retail stores established in each of said cities, the exact number respondent is unable to state, and engages in selling and offering for sale its merchandise at retail and to consumers and in quantities usually purchased by consumers at retail stores. That the said retail stores so established by said Basket Stores Company, in each of said cities, are located in different parts of said cities with a view and for the purpose upon the part of the owner thereof to directly and actively compete with all of the retail grocers in each of said cities. That the sale to the said Basket Stores Company, made by the said T. A. Snider Preserve Company as aforesaid, was in fact so made and accepted on the part of the said Basket Stores Company for the purpose of resale at retail to consumers and this gave to it, the said Basket Stores Company, a monopoly as retail dealer in such products and gave to it the said Basket Stores Company the power to destroy the competition of all other retail dealers in said cities or Lincoln and Omaha, including all of the usual and prospective customers of respondent and of all other competiting jobbers and thereby had a tendency to and did deprive respondent of customers to whom respondent contemplated reselling such products so purchased by it.

Paragraph Eight. Respondent for further answer says it is engaged in the business of selling groceries and kindred products to retailers as hereinbefore alleged and in wholesale quantities and it is not now nor has it been at any time covered by the charges in the complaint engaged in business as a retailer and deals only in such commodities as can be handled with a greater economy through the medium of a jobber. That respondent is not now nor has it ever been engaged in competition with the manufacturer or producer who, because of the nature of his product, can be by him distributed to the retailer or consumer with greater economy and it is neither possible nor practicable for the wholesaler to compete with the manufacturer or producer from whom the wholesaler must purchase products in a sale to retailer and consumer. The respondent admits it advised the said T. A. Snider Preserve Company that it would not purchase its products as a competitor of said T. A. Snider Preserve Company for sale to retailers and in so advising said T. A. Snider Preserve Company further advised it that respondent could not purchase its products and then add a

necessary and legitimate profit and compete with it in sales to retailers.

Paragraph Nine. Respondent further admits the receipt by it of the car of products of T. A. Snider Preserve Company containing the items and quantities hereinbefore specifically set forth and intended by the said T. A. Snider Preserve Company to be delivered to the companies hereinbefore named to fulfill contracts of sale made by the said T. A. Snider Preserve Company. Respondent received said car of products pursuant to a consignment through the medium of bills of lading made by the said T. A. Snider Preserve Company with the understanding, upon the part of respondent, that it was the purpose of said T. A. Snider Preserve Company that respondent should retain the quantities and items purchased by it and deliver to the other customers of said T. A. Snider Preserve Company the quantities and items purchased by them and included in the shipment. That there was no express contract between the respondent and the said T. A. Snider Preserve Company respecting the services respondent was to render or fixing the compensation it was to receive. Respondent, however, alleges the fact to be that it undertook to perform such service of distribution and therefrom there is implied a contract that it should receive from said T. A. Snider Preserve Company a reasonable compensation. Respondent further alleges that there is now and was, at the time of the receipt of said shipment, an established custom in trade generally recognized in the State of Nebraska and particularly in the city of Lincoln that car-

11 loads of goods delivered to a consignee containing shipments for such consignee and others that the consignee should perform the necessary service for delivery and should receive reasonable compensation for such service. Respondent further answering says that it promptly and fully performed all services required of it in making deliveries of the shipments contained in said car; that for delivery to the said Basket Stores Company respondent made a charge against said T. A. Snider Preserve Company of one hundred ($100.00) dollars; that such charge is and was a reasonable and just charge for the receipt and delivery of merchandise of the quantity and value of the items contained in said car for delivery to the said Basket Stores Company; that said charge is and was no greater than the charge usually made by wholesalers for the receipt and distribution of merchandise of like character, quantities, and values to a retailer.

Respondent, however, alleges the fact to be that the said T. A. Snider Preserve Company controverts the amount of such charge and contends that the same is in excess of the reasonable charge that should have been made. Such controversy, however, respondent alleges constitute a controversy respecting the value of service and right to recover the same and is governed exclusively by the law of the state of Nebraska and that of such question the Federal Trade Commission has no jurisdiction.

Now, therefore, the respondent asks that the charges contained in the complaint made by the Federal Trade Commission charging a violation by respondent of section 5 of the acts of Congress, approved September 26, 1914, be dismissed.

Your petitioner further represents that upon hearing the Federal Trade Commission formed the conclusion that the charges made in the complaint were sustained and that the methods of competition in question were prohibited by and in violation of the act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and on the 23rd day of February, 1921, the said Federal Trade Commission entered at its office, in the city of Washington, its report in writing stating it findings of facts, conclusion of law, and orders to desist, in words and figures following, to wit:

Report and findings of the Federal Trade Commission.

12 Pursuant to the provisions of an act of Congress, approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Raymond Bros.-Clark Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance by its attorneys, and filed its answer herein, thereupon witnesses were examined and evidence received in support of the allegations of said complaint and on behalf of the respondent, before an examiner of the Federal Trade Commission, theretofore duly appointed, and the testimony so taken was reduced to writing and filed in the office of the commission, whereupon, the proceeding came on for final hearing by said commission, and it having heard argument of counsel, and having duly considered the complaint, the answer thereto and the evidence adduced, and being fully advised in the premises, and being of the opinion that the method of competition in question is prohibited by said act, makes this its report, stating its findings as to the facts:

Findings as to the facts.

(1) Respondent is a corporation organized under and existing by virtue of the laws of the State of Nebraska. Its principal place of business is at Lincoln, Nebraska. Respondent's business is that of a wholesale grocer, buying groceries, provisions, and the like commodities in wholesale quantities from manufacturers thereof throughout the United States, which commodities are transported from points outside the State of Nebraska to the warehouse of the respondent at Lincoln, Nebraska, and are resold and transported to customers in and beyond the State of Nebraska. The business operations of the respondent include sales and deliveries in Nebraska, Colorado, Kansas, Wyoming, South Dakota, and Montana, and its annual volume of business is approximately $2,500,000.00. In the conduct of its busi-

ness the respondent is in competition among others, with the Basket Stores Company.

(2) The Basket Stores Company is a corporation organized under the existing by virtue of the laws of the State of Nebraska. Its principal place of business is at Omaha, Nebraska. The Basket Stores Company conducts two lines of business—one, that of a wholesale grocer, and that of retail selling through a chain or organization of retail stores. As a wholesale grocer, the Basket Stores Com-
13 pany maintains a warehouse at Omaha and a branch warehouse at Lincoln, Nebraska. It buys groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the State of Nebraska to the warehouses of the Basket Stores Company at Omaha and Lincoln, Nebraska, and are resold in part and transported to customers within and outside the State of Nebraska. This part of the Basket Stores Company's business is about ten per cent of the total. The Basket Stores Company was licensed as a wholesale grocery house by the U. S. Food Administration, which fact was known to the respondent. The Basket Stores Company also operates a series or chain of retail stores, seventy-two in number, four of which are in Iowa, the remainder being located in Nebraska. There are, at this time, eighteen stores operated by the Basket Stores Company in Lincoln. The groceries, provisions, and like commodities distributed through these stores were supplied from the Basket Stores Company's warehouses. About ninety per cent of the company's business was done through these retail stores. The total annual volume of the Basket Stores Company's business is approximately $2,500,000.00.

(3) In the month of September, 1918, a representative of F. A. Snider Preserve Company solicited from the Basket Stores Company's officials, at its head office at Omaha, and obtained an order for commodities produced by the Snider Company, to be shipped to the warehouse of the Basket Stores Company at Lincoln. The Snider Company also secured orders from the respondent and other customers in neighboring communities. The commodities sold in and around Lincoln were placed by the Snider Company in one car, consigned to respondent at Lincoln, making up what is known as a "pool" car to get the benefit of the freight rate on a car lot shipment. The Snider Company sent to respondent a statement of the car contents, showing the various business houses for which certain specified goods were intended, the Basket Stores Company and its purchase from Snider Company being shown on this statement.

(4) This pool car consigned to respondent reached Lincoln, Nebraska, on October 10, 1918, and was promptly unloaded, and the contents distributed by respondents. Its own commodities were placed in its warehouse, the commodities belonging to business houses outside of Lincoln were reconsigned to them by local
14 freight, and the other purchasers in Lincoln were notified of the arrival of their goods and promptly obtained the same,

except the Basket Stores Company. The commodities belonging to this company were stored in respondent's warehouse. The Basket Stores Company was not notified of the arrival of these goods in Lincoln or of their presence in respondent's warehouse, and no opportunity to obtain its goods was afforded the Basket Stores Company until November 15th, 1918, when respondent notified the Basket Stores Company of the presence of its property.

(5) The Basket Stores Company was in need of these commodities for its trade, its stock of these goods was low, and the delay in receipt due to the actions and failure of the respondent to extend to the Basket Stores Company the same course of dealing that it used with all the other owners of commodities contained in the pool car was a hindrance and an obstruction to the Basket Stores Company in the conduct of its business in competition with the respondent and others in the wholesale trade and with its competitors in the retail trade.

(6) On October 8, 1918, prior to the arrival of the pool car at Lincoln, the respondent having received the statement from F. A. Snider Preserve Company regarding the contents of the car and the distribution to be made thereof, in writing protested to the Snider Company against the sale direct to the Basket Stores Company, and asked for the allowance of the regular jobbers' profit on the sale, as though made through respondent. The Snider Company did not reply to this letter. Subsequent to the arrival of the car at Lincoln, the distribution of its contents to the owners thereof, except as to the Basket Stores Company, and while the goods purchased by that company were in respondents custody, respondent wrote the Snider Company, on October 22, 1918, referring to the unanswered letter and asking what it was to charge the Snider Company for checking out, unloading, and reshipping the other jobbers' goods. It likewise wrote the Snider Company on the same day with reference to damage to goods in transit. In response to a request from the Snider Company for payment, respondent wrote, on November 16th, declining to make payment to the Snider Company for goods purchased from it by the respondent until reply was made by the Snider Company to respondents letters (of October 8th and 22nd) and until allowance was made respondent for the jobbers commission on the sale to the Basket Stores Company. The Snider Company suggested that respondent remit, taking credit for amounts claimed, and explaining fully the reasons therefor. The respondent complied, deducting, among other amounts, the sum of $100.00 as commission on the sale to the Basket Stores Company. This deduction, among others, the Snider Company refused to allow, and returned the remittance. Whereupon, on December 16th, respondent wrote the Snider Company, insisting upon the allowance of this commission, protesting against the action of the Snider Company in selling direct to the Basket Stores Company, and threatening the Snider Company with the cessation of respondent's business and return of

all the goods produced by the Snider Company then in respondent's stock, if this commission were not allowed and the Snider Company continued direct sales to the Basket Stores Company.

(7) Early in January following, the Snider Company sent a representative to Lincoln, who interviewed the president of the respondent in an attempt to obtain a settlement of the controversy, which was not successful. The respondent, in accordance with the statements in its letter of December 16th, ceased to purchase from the Snider Company.

Conclusions.

The conduct of the respondent tended to, and did, unduly hinder competition between the Basket Stores Company and others similarly engaged in business, and the intent and purpose of the respondent was also to press the F. A. Snider Company to a selection of customers, in restraint of its trade, and to restrict the Basket Stores Company in the purchase of commodities in competition with other buyers, and the conduct of the respondent tended to the accomplishment of the intent and purpose of respondent.

Your petitioner further represents that said order to cease and desist is erroneous and should be reviewed by the court and upon review should be set aside for the many apparent errors and imperfections appearing from the record of said proceedings. Your petitioner further represents that the complaint filed as aforesaid, does not aver or charge against your commissioner any unfair methods of competition in commerce or violation of acts of Congress or practices or methods of competition in commerce whereof the Federal Trade Commission has or had jurisdiction. That no proof was made, offered or received by the Federal Trade Commission of any unfair method or methods of competition in commerce by your petitioner and the findings of fact so made by said Federal
16 Trade Commission are not supported by the evidence offered, introduced and presented to said Federal Trade Commission. That the conclusions opinions and order to cease and desist, so made and entered by said Federal Trade Commission, are not in law warranted by the evidence and are contrary to the evidence and are not sustained by the findings of fact and are contrary to law. That such order to cease and desist should not have been made and entered, based upon the record of the facts or based upon the findings of fact and the complaint should have been dismissed for the causes appearing of record and for the aforesaid reasons; that because of all of the errors and imperfections in the record of the proceedings had before said Federal Trade Commission and appearing of record in said cause your petitioner has brought this petition for review as provided by law.

Therefore in as much as your petitioner is without remedy in the premises except in this court, as provided by the act of Con-

gress aforesaid, and to the end that the Federal Trade Commissio may be required to certify and file in this court a transcript of th record of said cause in conformity with the provisions of said ac of Congress and that the said order to cease and desist may be re viewed, reversed and set aside and that no further proceeding shall be had or taken thereon and that your petitioner may hav such further relief in the premises as the equities of the cause ma require. May it please your honor to cause a copy of this petition t be forthwith served upon said Federal Trade Commission and tha said Federal Trade Commission be required, upon service of suc copy, to forthwith certify and file, in this court, transcript of th record in said cause.

RAYMOND BROS.-CLARK COMPANY.
By TINLEY, MITCHELL, PRYOR, ROSS & MITCHELL, *Solicitors.*
EMMET TINLEY, *Counsel.*

OFFICE OF FEDERAL TRADE COMMISSION,
Washington, D. C., April —, 1921.

Service upon Federal Trade Commission, respondent, of a copy of the original petition to review proceedings in the complaint of Federal Trade Commission vs. Raymond Bros.-Clark
17 Company, filed in the Circuit Court of Appeals of the United States is hereby acknowledged, at the place and upon the date appearing above.

ORDER DIRECTING FILING OF PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION, ETC.

(Filed April 23, 1921.)

On this 23rd day of April, 1921, comes Emmet Tinley, solicitor for Raymond Bros.-Clark Company, a corporation, and presents a petition for review of the order to cease and desist entered against the petitioner by Federal Trade Commission on the 23rd day of February, 1921, in a cause then pending before said commission, entitled Federal Trade Commission vs. Raymond Bros.-Clark Company.

It is ordered that said petition to review be filed and that a copy of said petition be forthwith served upon said Federal Trade Commission and that said Federal Trade Commission, upon service of such copy, forthwith certify and file in this court a transcript of the record of said cause.

WALTER H. SANBORN,
Presiding Judge.

ACKNOWLEDGMENT OF SERVICE OF PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION BY COUNSEL FOR RESPONDENT.

OFFICE OF FEDERAL TRADE COMMISSION,
Washington, D. C., May 5th, 1921.

Service upon Federal Trade Commission, respondent, of a
18 copy of the original petition to review the proceedings in the complaint of Federal Trade Commission vs. Raymond Bros.-Clark Company, filed in the Circuit Court of Appeals of the United States is hereby acknowledged at the place and upon the date appearing above.

ADRIEN F. BUSICK,
Acting Chief Counsel for Respondent.

(Copy of petition to review on order of the Federal Trade Commission, attached to the original acknowledgment of service by counsel for respondent, omitted at this point to avoid duplication.)
(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 14, 1921.

TRANSCRIPT OF PROCEEDINGS.

Certificate of secretary of Federal Trade Commission to transcript of proceedings.

I, J. P. Yoder, secretary of the Federal Trade Commission, do hereby certify that hereto annexed is a full, true, and correct transcript of the proceedings had before the Federal Trade Commission in the above-entitled case.

That this transcript is certified to the United States Circuit Court of Appeals for the Eighth Circuit, by reason of the filing in the said court of a petition for review of the order to cease and desist entered by said Federal Trade Commission under date of February 23, 1921.

[Seal
Fed. Trade Com.
U. S. of America,
MCMXV]

J. P. YODER,
J. P. YODER,
Secretary Federal Trade Commission.

19

Section 1.

Resolution of Federal Trade Commission authorizing issuance of complaint against the Raymond Bros.-Clark Company.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 28th day of October, A. D. 1919.

Present: John Franklin Fort, chairman; Victor Murdock, Huston Thompson, William B. Colver, commissioners.

Resolution.

Whereas the Federal Trade Commission has reason to believe tha Raymond Bros.-Clark Co. has violated and is violating the prov sions of section 5 of an act of Congress approved September 26, 191

Therefore, be it resolved, That the commission issue and serve o the said Raymond Bros.-Clark Co. its complaint, stating its charg in that respect in substantially the form hereto annexed; and be it

Further resolved, That notice be given to the said Raymond Bros Clark Co., as required by law, that the charges of said complai will be heard by the commission at its office in the city of Washing ton, D. C., on the 5th day of January, A. D. 1920, at 10.30 o'cloc in the forenoon of the said day, or as soon thereafter as the same ma be reached.

Adopted by the commission.

[Seal
Fed. Trade Com.
U. S. of America.
MCMXV]

(Signed) J. P. YODER,
J. P. YODER,
Secretary.

Section II.

(Complaint of the Federal Trade Commission against the Ra mond Bros.-Clark Co. omitted at this place to avoid duplicatio the same appearing at marginal page 2 of this record.)

20 Section III.

(Answer of the Raymond Bros.-Clark Company omitted at th place to avoid duplication, the same appearing at marginal page of this record.)

Section IV.

Notice of the Federal Trade Commission to take testimony an acceptance of service.

Notice.

You will take notice that witnesses will be examined and eviden received in the above entitled proceeding, before an examiner for th commission, at the Federal Building in the city of Omaha, Sta of Nebraska, beginning at 10 a. m. on the 13th day of Januar 1920, and continuing from day to day until the taking of testimon is closed or adjournment had.

Dated at Washington, D. C., this 22d day of December, A. D. 191

(Signed) CLAUDE R. PORTER,
Chief Counsel for Federal Trade Commission.

To Raymond Brothers-Clark Co., respondent herein, and Tinle Mitchell, Pryor & Ross, attorneys for respondent.

Service of above notice accepted and receipt of copy acknowledged, this 26th day of December, A. D. 1919.

(Signed) TINLEY, MITCHELL, PRYOR & ROSS,
Attorneys for Respondents.

Section V.

Order appointing Raymond N. Beebe as examiner.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 8th day of January, A. D. 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, commissioners.

21 The above entitled proceeding coming on for hearing on the complaint and answer thereto, it is hereby:

Ordered, That Raymond N. Beebe, an examiner of this commission, be and he is hereby appointed and designated to examine witnesses and receive evidence in said proceeding.

Dated January 8th, 1920.

[SEAL.] (Signed) J. P. YODER,
Secretary.

Section VI.

Testimony taken at Omaha, Nebraska, and exhibits.

Before the Federal Trade Commission.

Before Raymond N. Beebe, examiner.
Met pursuant to notice.

Appearances.

William C. Reeves, Washington, D. C., appearing on behalf of Federal Trade Commission.

Tinley, Mitchell, Pryor, Ross & Mitchell, Council Bluffs, Iowa, appearing for Raymond Bros.-Clarke Company.

Proceedings.

Exam. BEEBE. Gentlemen, we will proceed in this docket now, if you are ready.

Mr. REEVES. I will call Mr. King.

J. LUCERNE KING was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. REEVES:

Q. Give your full name to the reporter, Mr. King.

A. J. Lucerene King.

22 Q. What is your residence?

A. At present I am located in Omaha. My residence is still in Lincoln.

Q. How recently have you come to Omaha from Lincoln?

A. Four weeks ago.

Q. What is your business now, and what was your business prior to coming to Omaha?

A. Well, in Omaha I have charge of the warehouse end of the business. In Lincoln I had charge of the Lincoln chain of stores.

Q. For what company?

A. The Basket Stores Company.

Q. Were you employed by the Basket Stores Company in their Lincoln office in the latter part of 1918?

A. Yes, sir.

Q. In what capacity?

A. Manager of the stores.

Q. What did your duties consist of, Mr. King?

A. I had full charge of the stores in Lincoln; keeping them supplied with goods, and supervision of the stores.

Q. How many stores has the Basket Stores Company in Lincoln?

A. We had eighteen at that time. We discontinued one of them since then.

Q. Do you recall the circumstances of the Basket Stores Company getting a consignment of goods from the Snider Preserve Company in September or October of 1918?

A. Yes, sir.

Q. Have you a copy of that invoice with you?

A. I have.

Mr. REEVES. I will have this marked "Commission's Exhibit Number 1" for identification.

(The invoice referred to was thereupon marked "Commission's Exhibit No. 1" for identification.)

Q. (By Mr. REEVES.) How was your attention called, Mr. King, to the arrival of this consignment?

A. We received a phone call from Raymond Brothers.

Q. Do you remember the date?

A. On November 15, 1918.

Q. What did you do when you got the notice that the goods were there?

A. We got notice too late to take the goods out that day. We made arrangements that afternoon to take a transfer truck there the next morning and get the goods from their house, or from the car which I supposed they were in.

Q. Did you, in fact get the goods the next day?

A. Yes, sir.

23 Q. That was November 16th?

A. November 16th.

Q. Did you ascertain at that time or since the dates these goods arrived in Lincoln?

A. I have ascertained since. I did not know at that time.

Mr. TINLEY. Wait. I object to that as incompetent; also hearsay evidence.

Exam. BEEBE. You may answer.

The WITNESS. The car arrived in Lincoln on October 10th.

Mr. TINLEY. I object to the answer as not responsive.

Q. (By Mr. REEVES.) The answer should have been "yes" or "no," and then I would have followed it up.

The WITNESS. I beg your pardon.

Q. How did you ascertain that the goods arrived on October 10th?

A. By the railroad records in the Burlington office in Lincoln.

Mr. TINLEY. The defendant now objects to the statement of the date of the arrival of the goods, for the reason that it is incompetent and hearsay, and not the best evidence.

Exam. BEEBE. The objection will be noted and considered by the commission.

Mr. REEVES. I now offer commission's Exhibit Number 1 for identification.

Exam. BEEBE. It may be received.

(The document was thereupon received in evidence, marked "Commission's Exhibit No. 1, Witness King," and is forwarded herewith.)

Mr. REEVES. You may cross-examine.

Cross-examination:

Q. (By Mr. TINLEY.) What is your position now?

A. I am in the Omaha office; I have charge of the warehouse department.

Q. Where is that warehouse located?

A. At 9th and Leavenworth.

Q. How long have you been in that position?

A. About four weeks; possibly four and a half.

Q. Prior to that time, for what period were you at Lincoln?

24 A. About three years and five months, that I had charge of the Lincoln department.

Q. Now, you spoke about the company having eighteen stores at one time at Lincoln?

A. Yes, sir.

Q. What were those stores?

A. Retail stores.

Q. Of what character?

A. Grocery and meat.

Q. Scattered pretty well throughout the city of Lincoln?

A. Yes, sir.
Q. Selling at retail?
A. Yes, sir.
Q. And direct to consumers?
A. Yes, sir.
Q. And in direct competition with the retail stores of Lincoln?
A. Yes, sir.
Q. Your position was that of manager, you say?
A. Yes, sir.
Q. Of those stores?
A. Yes, sir.
Q. You had all of them in Lincoln?
A. I had charge of all of them, yes, sir.
Q. Did you have any warehouse in Lincoln?
A. We did.
Q. And from that warehouse you supplied those eighteen stores?
A. Yes, sir.
Q. The warehouse was operated by your company, as well as the stores?
A. Yes, sir.
Q. The warehouse was simply a storehouse for the merchandise for those stores?
A. Yes, sir.
Q. That is true?
A. Yes, sir. Well, we supplied our own stores as well as others if we had a sale for other goods to other merchants.
Q. To what extent did you supply any other merchants?
A. Very little in Lincoln.
Q. I am talking about Lincoln. I am talking about your management there at Lincoln.
A. Our handling of things along that line in Lincoln was more to large consumers, like restaurants, that usually buy direct from the wholesaler.
Q. What you mean then is that you sold direct to consumers, private families, or restaurants?
A. Yes, sir.
Q. And that comprehended your entire business, as a matter of fact?
A. Almost entirely.
Q. Did you deliver to restaurants?
A. Yes, sir.
Q. Did you operate delivery trucks?
A. We did at that time; yes, sir.
Q. Did you deliver to private families?
A. Yes, sir.
Q. In delivery wagons or trucks?
A. We used trucks mostly.
Q. Such as the ordinary retail grocer handles?

25 A. Yes, sir.

Q. So that then, during the period you speak of your entire business was—substantially so at least—selling direct to consumers?

A. The larger per cent of it.

Q. And you bought very largely from wholesalers?

A. Our buying was done at this end, most of it.

Q. What is that?

A. Most of our buying was done in Omaha and shipped to our warehouse.

Q. You had deliveries made to you by different wholesalers at Lincoln?

A. Yes, sir.

Q. In large quantities, covering the entire year?

A. Yes, sir; just from one wholesaler though in Lincoln.

Q. Well, that amounts to ten or fifteen thousand dollars a month?

A. I couldn't say as to the exact amount.

Q. Your company then, as I understand it, is simply operating a chain of retail stores, dealing in merchandise such as is usually carried by the retail grocers, selling direct to consumers?

A. Not entirely; no, sir.

Q. Well, to what extent did you do otherwise?

A. That I couldn't tell you, because that is all handled in another department and it does not come under my department at all.

Q. To what extent did you deliver otherwise?

A. I couldn't say that, because that was handled from this end. For Lincoln alone it would not be a very large percentage.

Q. Well, I mean in Lincoln. That is the only place where you have any personal knowledge, isn't it?

A. Yes, sir.

Q. So that anything that you have said with reference to Omaha or elsewhere is not based upon your personal knowledge of the matter?

A. Well, it would not come under my department.

Q. What is that?

A. It would not come under my department.

Q. Well, I am right in assuming that that did not depend upon your personal knowledge?

A. I don't just get your question.

Q. Well, you had nothing to do with it personally?

A. No.

Q. And know nothing about it from a personal standpoint?

A. Outside of what little we handled there in Loncoln, in that way.

Q. The little you handled there was to the larger consumers, such as restaurants and things of that kind?

26 A. People that are ordinarily supplied by wholesale houses.

Q. Well, your classification may be correct, but I do not know. To what people do you refer?

A. Restaurants.

Q. Now, aside from restaurants and direct consumers, what sales or deliveries did you make?

A. Well, right at this particular time we had very little.

Q. I mean during the period that you were there.

A. Very little.

Q. A negligible quantity?

A. Well, I couldn't state. I haven't the records at hand. By going back over the records I could probably find some information that could be figured out on a percentage basis.

Q. Well, I mean outside of families, restaurants, hotels, people who are buying for consumption in their establishments, can you name one?

A. No; I could not, without going back and looking up the data on it.

Q. You have no recollection on it?

A. I have none without going back and looking over the records.

Q. It is true then, is it not, that your sales were to consumers of the classes that you have named, as a general proposition?

A. Generally; yes; yes.

Mr. TINLEY. I think that is all until Mr. Raymond gets here. His train is a little late.

Exam. BEEBE. You may recall him for further cross-examination.

Mr. REEVES. There are a few questions that I probably should have asked on direct examination.

Redirect examination by Mr. REEVES:

Q. One of the questions that I omitted to ask was: Were the stores in Lincoln in need of these goods which you received November 16th?

A. They were.

Q. Had you been embarrassed or bothered by delay in the arrival of the shipment?

A. Yes, sir.

Mr. TINLEY. That is incompetent and calls for the conclusion of this witness.

Mr. REEVES. Well, state what the facts were in that regard. Was your stock of catsups and other commodities which were contained in that shipment, low, and were you in need of these particular goods at that time? State what the condition of your stock was.

27 Mr. TINLEY. The same objection.

Exam. BEEBE. It will be noted. He may answer.

The WITNESS. We needed the goods. We were buying goods to supply our stores at the time on account of this delay.

Q. (By Mr. REEVES.) Buying from whom?

A. Buying from Granger Brothers in Lincoln, and also shipping from Omaha from our warehouse. I had occasion to talk to Mr. Bryan, our buyer, in Omaha, several times, and each time would ask him about these Snider goods, why we did not receive them.

Mr. TINLEY. I object to the conversation as incompetent and hearsay.

The WITNESS. Because we were in need of them.

Exam. BEEBE. The objection will be noted.

Q. (By Mr. REEVES.) Now, with reference to restaurants and hotels purchasing supplies from wholesale grocers, is it customary in the trade for wholesale grocers to sell to restaurants and hotels in wholesale quantities at wholesale prices?

A. It is.

Mr. TINLEY. That is not competent; calls for the conclusion of this witness; and the witness is not competent.

Exam. BEEBE. He may answer.

Q. (By Mr. REEVES.) I will first ask you, are you familiar with the trade custom with reference to the sale by wholesale grocers of groceries and food products to hotels and restaurants?

A. Are you familiar with the custom that prevails in the trade generally?

A. I am familiar with the custom that prevails in the city of Lincoln. Outside of that I couldn't say.

Q. Well, what was the custom in Lincoln, to your knowledge?

A. The restaurants and hotels in Lincoln buy their supplies from the wholesale grocers and packing houses direct.

On the same terms that retail stores purchase them?

Mr. TINLEY. That is incompetent and the witness is incompetent.

Exam. BEEBE. The objection will be noted. You may answer.

28 The WITNESS. I don't know what price they pay, but I know that they get their goods direct from the wholesale house; that is a large percentage of them; possibly not all of them.

Q. (By Mr. REEVES.) Do you mean you are not familiar with the question of whether they get the same terms and the same prices?

A. No; I couldn't say as to that. I do know when we try to sell the restaurants we butt up against the wholesale proposition. They tell us they buy from the wholesaler and we are unable to sell them. That is in a majority of cases.

Q. Are you familiar, then, with the custom that prevails with reference to whether hotels and restaurants are required to pay the usual retail price?

Mr. TINLEY. That is incompetent and the witness is incompetent. His testimony disclosing that it depends upon information given to him by the proprietors of hotels and restaurants; hearsay.

Exam. BEEBE. The objection will be noted. You may answer.

A. I judge from the obstacles we run up against in trying to sell them in the majority of cases, that they do not have to pay the retail price.

Mr. TINLEY. I move to strike the answer from the record, for the reason that it is incompetent and gives the conclusion of this witness.

Exam. BEEBE. The motion will be considered by the commission.

Mr. REEVES. That is all.

Recross-examination by Mr. TINLEY:

Q. To what hotels in Lincoln do you refer?

A. In what way, Mr. Tinley?

Q. As customers, to whom you have sold?

A. The only one I can recall, without going back over our records, is the Orpheum Cafe.

Q. That is the only establishment of that character or that classification that you can now call to mind, during your experience?

A. That is, that we sold in large quantities—without going back over our records.

29 Q. To what hotels did you refer when you directed attention to the understanding that sales were made by wholesalers?

Mr. REEVES. If the examiner please, I wish to interpose this objection: I object to the respondent bringing out what might be termed trade secrets or names of customers, sources of supply or confidential information of that kind which would be of value to competitors of the Basket Stores Company. We do not object to the respondent going into the question of volume of business, classes of customers, and so forth; but we do object to the witness being required to give the names of customers, the sources of supply, and information of that nature.

Exam. BEEBE. I think you misunderstood his last question. Counsel is referring to the hotels that are generally interested in buying from wholesalers, in general, as I understood.

Mr. REEVES. If he means the question to apply to wholesalers generally I think probably it is competent.

Mr. TINLEY. I have no purpose at all to get out any trade secrets or violate the provisions of the statute with reference to any information of a private character that would be available to a competitor, and injurious, as matter of commerce, to the business of this establishment. The question was designed to call for information with reference to the hotels that he said were supplied by wholesalers.

(Question read by the reporter.)

Exam. BEEBE. You may answer.

A. What do you want? The list of people that I have been unable to sell because they buy their goods from wholesalers?

Mr. TINLEY. No; that information would be perhaps improper for me to call for. A great many things may enter into that, and I do not care to call for that; but you said that certain hotels were supplied by wholesale dealers in Lincoln. Now, if you have any personal knowledge of any hotels so supplied I would like to have you give it to me.

A. I can only think of two that I tried to sell personally and found that objection.

Q. Well, you are now proposing to give me the names of two hotels that you tried to sell and failed to sell for the reasons they gave you?

A. Yes, sir.

30 Q. But have you any personal knowledge of sales made by wholesalers in fact, to such hotels?

A. No; I have not that information, personally.

Q. All you know is what the hotel proprietors told you as the reason why they could not purchase from you?

A. Yes; I suppose that would be the extent of my knowledge.

Q. That is correct?

A. Yes, sir.

Q. Now, you have said that you were embarrassed by the delay in the delivery of the Snider invoice. Do you remember when that was ordered?

A. I couldn't give you the exact date. It was early in September; some time in September.

Q. Now, the information you have given us with reference to the date of arrival at Lincoln is the statement that you *you* obtained from an examination of the railway books?

A. Yes, sir.

Q. Do you know whether that is the time of arrival of the car in Lincoln or the time of the spotting of the car at Raymond Brothers establishment?

A. The information I have is that the car arrived in Lincoln on October 10th and was spotted at Raymond Brothers on October 11th.

Q. I was not asking you the information you had. I asked you a specific question. I think you did not understand it.

(Previous question and answer read by the reporter as above recorded.)

A. The information that you want on that question then is that that was the date of the arrival of the car?

Q. (By Mr. TINLEY.) I want to know whether you have any personal knowledge as to when the car was spotted at Raymond Brothers warehouse?

A. Nothing only the railroad records in Lincoln.

Q. Have you a book account showing the date of delivery of this invoice to you?

A. I kept a copy of the invoice in my office, which I always did on the receipt of goods, and I have the date of delivery marked on here, which I marked on when I O. K'ed a copy of the invoice, at the time, after checking the shipment.

Q. I would appreciate it very much if you would answer my question and not shift.

Exam. BEEBE. Read the question, please.

(Question read as above recorded.)

31 A. I don't know just exactly what you want. Here is the information right here. We have the information.

Q. (By Mr. TINLEY.) I hardly know how to make it any plainer, Mr. King; I will try. What I am asking for is whether you kept any book account.

A. We kept no books in our Lincoln office whatever.

Q. You have no book entry then, I take it?

A. No. We would not have in our Lincoln office. I asked how that is handled on the accounting end of the business, and I would report

to them when the goods were received, and I suppose an entry would be made in the books.

Q. I am just asking for your information. At Lincoln you kept no book accounts?

A. No, sir; not in Lincoln.

Q. On that subject?

A. No, sir.

Mr. TINLEY. That is all.

(Witness excused.)

A. T. DAVIS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination:

Q. (By Mr. REEVES.) Give your full name to the reporter.

A. A. T. Davis.

Q. Where do you live, Mr. Davis?

A. Kansas City.

Q. What is your business?

A. Sales manager of T. A. Snider Preserve Company.

Q. What is the general nature of your duties as such manager?

A. Well, I have charge of the Kansas City office. I have charge of the jobbers in the different States within my territory; also have supervision of the retail salesmen.

Q. State generally what sort of products the Snider Preserve Company manufacture and sell.

A. Well, we make catsup, chili sauce, cooktail sauce, salad dressing, soup, pork and beans, and jams.

Q. Does your territory or your sales territory include Omaha and Lincoln, Nebraska?

A. It does.

Q. Have you made any sales of your product to the Basket Stores Company?

32 A. Yes, sir.

Q. Do you recall an order given by that company in September, 1918?

A. I do.

Q. Do you remember the date that order was given?

A. The date that the order was given, no.

Q. Well, can you state approximately?

A. Well, no; I couldn't tell you. I think it was in September when the order was sold.

Q. To refresh your recollection, I will show you the commission's Exhibit Number 1, which has been received in evidence. Does that refresh your recollection as to the date?

A. That is the date of the shipment, not the date of the order.

Q. I thought that might refresh your recollection as to the date the order was given.

A. No; I have no record with me that is to the particular date when this order was given. The only date is as to the shipment.

Q. Well, how was this consignment of goods, as contained in commission's Exhibit No. 1—how was it shipped to the Basket Stores Company?

A. It was shipped in a pool car to Lincoln.

Q. What is a pool car?

A. A pool car is where we have several different shipments—no one buyer buying enough to make a carload, but giving all who have goods coming the advantage of the carload rate of freight with their pool car, and ship it to a warehouse company or to some jobber for distribution.

Q. Now, in this particular shipment, did the goods of other consignees accompany it?

A. Yes, sir. In this car we had a shipment to Raymond Bros.-Clark Company; Blackmann-Fuller Company of Hastings; the Blue Valley Mercantile Company, Beatrice, Nebraska, and this shipment for the Basket Stores Company was sold to their Omaha house, and they had made a requisition on what they had bought here at Omaha and had it shipped to Lincoln.

Q. Have you a memorandum of the names of the consignees and the items shipped to each consignee in that car?

A. I think I have. Do you mean the amounts that were in the car?

A. Well, I think you have already given the names. If you have a memorandum containing those names I would like to have the memorandum.

33 A. Well, that is on another page in another file here somewhere. It is the file that you had there a few minutes ago.

Mr. Reeves. I will ask the reporter to mark this "Commission's Exhibit No. 2" for identification.

(Document referred to was thereupon marked "Commission's Exhibit No. 2" for identification.)

By Mr. Reeves:

Q. I will show you a paper marked "Commission's Exhibit No. 2" for identification, and ask you to state what it is, if you know?

A. Well, that is a duplicate of a car shipment.

Q. This particular car shipment we are talking about?

A. This particular shipment.

Q. Does it contain the names of all the persons to whom goods were shipped in that car?

A. It does, yes. Raymond Brothers-Clarke; H. P. Lau Company, Granger Brothers Company, Basket Stores Company, Bradley-Hugley Company and the Blue Valley Mercantile Company.

Q. All together it made up what is known as a minimum carload?

A. Minimum carload, yes.

Q. I don't remember whether you stated the purpose for combining this shipment? What is the purpose for combining shipments in one car, to two or more consignees?

A. So that it will make their cost of the goods at a minimum. If the goods were shipped in local freight, the cost of their goods delivered at their local point would be much higher, as our goods are sold f. o b. factory.

Q. There is some considerable difference then in the carload freight rate and the local freight rate?

A. Yes, sir, considerable.

Q. Now, concerning this shipment to the Basket Stores Company, did any controversy subsequently arise between your company and Raymond Bros.-Clarke Company in reference to it?

A. No, sir.

Q. Was your attention called to any controversy arising out of that shipment subsequently?

A. No.

Q. Did you have occasion to go to Lincoln to adjust any supposed difficulty that had arisen?

A. The first I knew of any difficulty or dissatisfaction was early in January.

34 Q. What year? The following year?

A. That would be 1919.

Q. How was that called to your attention?

A. Well, I received a file of correspondence from our Chicago office between Raymond Bros.-Clarke Company and our company, together with a statement of expenses of unloading the car and making shipments to Beatrice, Hastings, Nebraska City, together with a statement of checking the car, with the railroad check slip report showing the arrival of the car, the date of unloading, the date of shipment, and the date that it was received.

Q. Have you that original correspondence from Raymond Bros.-Clarke Company in your possession, and the carbon copies of the answers which your firm wrote to Raymond Bros.-Clarke Company?

A. Yes, sir; I have.

Q. Will you produce those letters, please?

A. Yes, sir. [Produces same.]

Mr REEVES. There are several items, and I will have each one marked separately for identification, "Commission's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, and 11."

(The documents were thereupon marked "Commission's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, and 11" for identification.)

Mr. REEVES. I am not offering those right now, but I will offer them later.

By Mr. REEVES:

Q. I believe you said that you went to Lincoln and had a conference with Raymond Bros.-Clarke Company?

A. Yes, sir.

Q. What was the date of that trip to Lincoln?

A. I cannot give you the exact date that I was in Lincoln. It was in the week—I wrote a letter to our firm, as to my conversation

meeting with Mr. Raymond, on January 12th. It was a day or two prior to that. I would say the 10th or 11th of January.

Q. Did you have a talk with any officer or person connected with that company?

A. Mr. Raymond.

Q. Which Mr. Raymond?

A. Why, I don't know what his first name is. Mr. Raymond sitting there.

Mr. TINLEY. William H. Raymond.

The WITNESS. William H. Raymond.

35 By Mr. REEVES:

Q. What statement, if any, did Mr. Raymond make to you with reference to this controversy?

A. Well, as to what statements do you mean? Of what nature?

Q. Well, it appears from the correspondence which I have had marked as exhibits, that they made a claim of $100 alleged commissions?

A. Yes.

Q. Did you talk with Mr. Raymond about that charge of $100?

A. Yes. While I was there—that was the purpose of my visit to Lincoln. He had deducted $100 from the remittance to us, stating on his remittance blank that it was a commission on the Basket Stores Order, together with some other charges that he had, amounting to—I do not think I have that, however, there was—he took a discount of $27.58.

Q. What is that? 1½ per cent?

A. 1½ per cent on his particular shipment.

Q. Of his purchase?

A. Yes, sir. We took issue with them on that, because he took his discount after the date of discount.

Q. What is the period in which the discount is allowed?

A. Ten days from date of shipment.

Q. Had he made remittance within that ten days' period?

A. No, he had not. He made remittance on November 29.

Q. That was expiration of the ten days?

A. Yes; the car was shipped on October 4, I believe. Then there was a charge of $110.68 for miscellaneous charges.

Q. Was there any controversy about that charge?

A. No. I had no controversy about that. I presume that was all understood. Then the next charge is the $100 commission on the Basket Stores, and $7 for the drayage on goods going to Nebraska City and Beatrice; checking car, $3.

Q. Did your conference with him relate almost exclusively to that $100 charge?

A. Yes. That is the only thing that I was expected to go up there and straighten out.

Q. What did Mr. Raymond claim he was making that charge for?

A. Well, he was making the charge for the shipment that we made to the Basket Stores Company.

Q. Did he claim that the Basket Stores Company was one of his customers?

A. No.

36 Q. Was the Basket Stores Company, as a matter of fact, his customer?

A. Why, that I couldn't answer, not knowing whether they bought any goods of him or not.

Q. Did this order for the Basket Stores Company come through Raymond Brothers-Clarke Company?

A. No.

Q. Well, if he did undertake to justify the charge, what did he say?

A. Well, I have a copy of a letter. I will have to see what the conversation was in that.

Q. You mean you wrote a letter to your firm?

A. I wrote a letter to our firm.

Q. About this transaction?

A. About the entire transaction.

Q. And about the conversation you had with Mr. Raymond?

A. Yes. I pointed out in my conversation with Mr. Raymond that he had deducted $100 commission, and told him that we could not allow any commission. I asked him what he based his commission on, what percentage, and he said he did not base it on any percentage: he just took off $100. I at that time told him that I understood that the Basket Stores were not trading with him; not buying anything, and told him that as I understood it, they were not customers of his, and even if they were, it was not right for him to take $100 off of his remittance to us.

Q. Did you succeed in getting an adjustment of this controversy?

A. No, the matter stood exactly, after I left, as it was before I got there.

Q. Did Mr. Raymond say what he might do about this matter, if anything?

A. Well, Mr. Raymond told me when I told him that as I said, the Basket Stores Company were not customers of his, he said, "Well, then, if you can find any other jobber that they were doing business with," that he would be willing to turn that $100 over to him. I told him no, we would not care to do that, we would not agree to that. It was our money and I did not feel that he was justified in using our money to hand over to somebody else.

Q. Did he make any statement about taking the matter to the Iowa-Nebraska Wholesale Grocers Association.

A. I told Mr. Raymond—about the last thing I had to say to Mr. Raymond was this—that our firm would take the matter

37 up with the Federal Trade Commission if there was not some settlement made on the spot; some understanding with me. He told me that if we did he would take the matter up with the

Iowa-Nebraska Wholeasle Grocers Association, with the recommendation that they take it up with the national association.

Q. Did he make any statement about what the association had to do with it; what they might do or what their authority in the matter might be?

A. No.

Q. Well, did he make any suggestion or statement as to what the result might be if the matter were called to the attention of the association?

A. Well, he says to me, he says, "If you can stand the publicity for a hundred dollars, why, we can stand it too."

Q. Publicity as to what?

A. As to selling the Basket Stores direct.

Q. Well, what is the result when a manufacturer sells to a general store, for instance, or buying agency; what happens to that manufacturer?

Mr. TINLEY. That is incompetent; a conclusion.

Exam. BEEBE. The objection will be noted and it will be considered by the commission.

By Mr. REEVES:

Q. You have been in the business of selling food products for some years, I take it?

A. About twenty years.

Q. Have you had occasion to observe the practice in the trade with reference to manufacturers selling to chain stores or buying agencies?

A. Yes.

Q. What is the result, or what effect does it have upon the business of the manufacturer who sells to chain stores or buying agencies?

Mr. TINLEY. It is incompetent and calls for the conclusion of this witness.

Exam. BEEBE. The objection will be noted. You may answer.

A. Well, that depends entirely upon the location. In some locations the jobbers have no objections.

Q. (By Mr. REEVES.) In what localities particularly does that condition prevail?

Mr. TINLEY. The same objection.

Exam. BEEBE. It will be noted. He may answer.

38 By Mr. REEVES: You mean in the eastern States?

A. I cannot speak for any States only those that I have charge of. I know what the conditions are, but I cannot state on authority.

Q. Well, what are the conditions that prevail in what is known as the Missouri River district territory?

Mr. TINLEY. The same objection.

Exam. BEEBE. It is noted.

A. The Missouri River district, you know, is divided up as pertains to wholesale grocers. There is the Iowa-Nebraska Association;

then there is the Missouri-Kansas, and, I think, Oklahoma Association.

Q. Has it been your observation that when a manufacturer deals direct with these chain stores, that the so-called regular wholesale grocers oppose it or undertake to boycott the goods of the manufacturer who sells the chain stores?

Mr. TINLEY. That is incompetent; calls for a conclusion of the witness.

Exam. BEEBE. The objection will be noted. He may answer.

A. There is a tendency of jobbers in some points—jobbers won't issue no boycott, but it is a case of their losing interest in your line. There is an underlying feeling, where a thing of this kind would come up, in case you would sell some one in their particular town, the jobber would absolutely refuse to buy of you. That is not a general condition.

By Mr. REEVES:

Q. Have you had complaints made to you by so-called regular wholesale grocers because you sold to buying agencies or chain stores?

A. Well, none as I would call direct, only in conversation.

Q. Well, what was the substance of those conversations or statements made to you?

Mr. TINLEY. That is incompetent and hearsay.

Exam. BEEBE. The objection will be noted. You may answer.

A. Well, I don't quite get your point.

39 By Mr. REEVES:

Q. You stated that you had had made to you complaints or protests, by so-called regular wholesale grocers, because you might sell to buying agencies or to chain stores.

A. Well, the only one that I have had is this case, here, of Raymond Brothers. They made their protest in their letter. That was direct to our Chicago office.

Q. You mean the Raymond Bros.-Clarke Company?

A. Raymond Bros.-Clarke Company, yes.

Q. Are you familiar, Mr. Davis, with the custom that prevails in the trade with reference to wholesale grocers selling food supplies direct to restaurants and hotels?

A. Yes, perfectly familiar.

Q. What is that custom?

A. The custom varies. In some localities the jobber will sell an restaurant or big consumer, commissaries, hotels, if their credit is good. In other localities the jobbers protect the retailer by not selling them.

Q. Well, where the hotel or restaurant is given this recognition, on what terms does the hotel or restaurant buy its supplies?

A. The same as the retailer.

Mr. TINLEY. That is incompetent and hearsay. It is immaterial. No application as to point of time or location.

Exam. BEEBE. The objection will be noted. The answer will stand.

The WITNESS. The only thing that I can answer positive on that is where our retail men are working the trade. For instance, we are working Lincoln, and our retail man would came into a restaurant and sell a restaurant through one of the jobbers over there. The first question our man would ask them, after they had received the order, "What jobber they are buying their goods through." If they stated "Raymond Bros.-Clarke Company," we would ask them if they wanted the goods shipped through Raymond Bros.-Clarke Company, and we would enter the order up through Raymond Bros.-Clarke. Then the order is taken to buyer or credit man, and he passes on it, whether it is acceptable to them or not.

Mr. TINLEY. I move to strike the answer now because it appears by the conversation with salesmen in the employ of the Snider Company and not with the witness. It is consequently hearsay.

40 Exam. BEEBE. The motion will be considered by the Commission.

By Mr. REEVES:

Q. I was seeking to show more particularly by this witness, if I could, what the custom was that prevailed in Omaha, Lincoln, and adjacent points. Did this testimony that you have just given relate to the particular district of Omaha and Lincoln?

A. Well, no; it was in a general way. I have taken orders in Lincoln, and we have taken them through Raymond Brothers, from restaurants.

Q. Do you know, Mr. Davis, from your own knowledge, whether the wholesalers in Lincoln and Omaha do sell to restaurants and hotels on the same terms that they sell to the retail trade?

A. Yes, on our goods.

Q. They do?

A. They do on our goods. You understand that is general. They do not sell every one.

Q. Now, with reference to this conversation that you stated you had with Mr. Raymond, you stated it was in January, but you did not fix the year. Was that January, 1919?

A. 1919; yes, sir.

Mr. REEVES. You may cross-examine.

Cross-examination by Mr. TINLEY:

Q. Mr. Davis, before you had in front of you the memorandum or a shipping bill, you gave the name of Blackburn-Fuller of Hastings. That I do not find on the shipping bill, and I apprehend that was simply a mistake on your part?

A. Well, it may be. We sold that firm at the same time. I did not know positively whether it was in that car or not.

Q. Not finding it on the shipping bill, I assume it was not in that car?

A. It may not have been in that car. We had a shipment for ther
Q. The T. A. Snider Preserve Company is a manufacturer strictly
A. Strictly a manufacturer.
Q. Manufacturing catsup, chili sauce, soups, salad dressing, oyst
cocktail dressing, and matters of that kind?
A. Yes.
Q. Now, you spoke about the custom of the pool car shipmen
That, I assume, is quite general?
A. Yes.
Q. In the handling of your goods?
A. Yes.
41 Q. You have an established policy, I take it, of distribu
tion?
A. Yes.
Q. That is, you distribute through the jobber or wholesaler?
A. Yes.
Q. That is the general policy of your company?
A. I think so.
Q. The fact, however, is that pool car shipments are quite genera
because the amount of the order by each house in many localiti
would be less than a carload lot?
A. Yes.
Q. And in a town the size of Lincoln it is quite general to mak
shipments in the so-called pool car?
A. Yes.
Q. And do you have a fixed selling price?
A. Yes.
Q. On your commodity?
A. Yes, sir.
Q. You sell at so much per case?
A. At so much per dozen.
Q. So much per dozen, with fixed discounts?
A. Yes.
Q. That is, to the jobber?
A. Yes.
Q. The selling price without considering the discount, is the pric
of resale?
A. What is it?
Q. That is the resale price?
A. That is the cost at the factory.
Q. Well, is the cost at the factory a certain list price less dis
counts?
A. Yes.
Q. The list price is the retail price, I assume?
A. I don't know what you mean by "retail price." That is wha
his selling price is based on; his cost.
Q. His cost price is the list price less the discount?
A. Yes, the cash discount.
Q. Is it simply a cash discount or is there a trade discount?

A. There is no trade discount.

Q. So the question of list price and discount has no reference to the margin of profit or compensation for handling by the wholesaler?

A. No. He put his own price on it.

Q. Now, when you sell to a jobber, you do it with the full knowledge that he is a distributing agency, handling goods, buying and reselling in smaller quantities?

A. Yes.

Q. To retailers?

A. Yes.

Q. And the price of your commodities, especially in small amounts, an amount for which a retailer would make the product really prohibitive, wouldn't it?

A. In shipping in less than carloads?

Q. Yes.

A. Well, that woud depend entirely upon the added profit the jobber wanted to put on.

42 Q. No, but taking it as a general rule, going into territory in competition with pool shipments, the price would really be prohibitive?

A. No, it would not, for this reason: If a jobber in a nearby point would get his goods in less than carloads and pay the less than carload rate and was satisfied with ten per cent, why, he could work in direct competition with a jobber who was buying his goods in carloads, or getting, the carload rate of freight, and getting from fifteen to twenty per cent.

Q. Yes, but you know enough about the business to know that ten per cent would not be compensatory?

A. What is that?

Ten per cent would not be compensatory?

A. Well, I don't know, of course. That all depends on the jobber. I know some jobbers that will handle large shipments on a very small margin.

Q. What I want to get at is this: Your business as a manufacturer could not be handled from the manufacturer direct to the consumer without great added cost?

A. Of course, that is a matter which I know nothing about. I could not state positively what it would cost us to market our goods direct to the average little retailer.

Q. Well, it would mean an infinitely large number of accounts?

A. Well, there is other concerns that are handling it in that way.

Q. Greatly increasing the expense account?

A. Yes.

Q. And the manner of shipping would greatly increase the price?

A. Well, it would not increase it so terribly, no. We work the retail trade, and we furnish the retail men, and we sell a big percentage.

Q. We will come to that in a minute. But the price the consumer would actually pay woud be larger than it is by this method of handling?

A. No, I don't think so.

Q. You mean, if you ship direct to a consumer without an intermediate agency or wholesaler or retailer, that the cost would not be greatly increased?

A. No.

Q. It would mean keeping track of all of these accounts, and instead of shipping by carloads, shipping by express, without increasing the cost?

A. Well, it would if you would ship by express, yes.

Q. Well, I assume then that you would reduce your profit to consume the extra freight cost?

43 A. Well, I could not—that is going into figures that I cannot tell you off-hand what it would cost us per dozen to market these goods direct to the retailer. It all depends on the retailer; the size of his order, and how much it costs to sell the goods.

Q. At any rate, you have a fixed policy and have had for years, of selling not to the retailer, but to the wholesaler or jobber?

A. Yes. We market our goods through the jobber.

Q. That is the general policy of your company?

A. Yes.

Q. You recognize the fact that when you sell to a jobber in Lincoln, that his field for resale is in the territory tributary to Lincoln?

A. Yes.

Q. And that means, in general statement, a resale to a retailer, who in turn is selling direct to the consumer?

A. Yes.

Q. Now, you do not then aim to sell to a jobber and then at the same time directly sell to a retailer in his territory?

A. Yes. We got out and sell the goods for him.

Q. Well, you do not mark my question. You do not aim, then, to directly sell you yourselves, to the retailer?

A. Not to the average retailer, no.

Q. In his trade?

A. No, not to the average retailer.

Q. You recognize the fact then, that if you sell directly to one retailer, running a corner store, direct from your factory, then the jobber has a customer next door, with his added profit, that you destroy the ability of his customer to compete with the customer, do you not?

A. Well, if we should sell his customer, yes.

Q. That is, if you should sell, not his customer, but your customer, who is a retail dealer next door to his customer, that you destroy the ability of his customer to compete with your customer?

A. I presume that is correct.

Q. Well, that is recognized, isn't it?

A. I presume so, yes.

Q. As a matter of fact, you do not aim to do that, do you?

A. No, we do not sell the small retailer.

Q. That is not the policy of your concern?

A. No, not to sell the small retailer.

Q. Then you distinguish the large retailer in a city, who is in direct competition with the small retailer—if I understand you correctly, it is the policy of the T. A. Snider Preserve Company to place a handicap on the small retailer?

44

A. Not generally, no.

Q. Well, but you say you sell to the large retailer?

A. Not always; not generally.

Q. Then your policy is not to sell to the retailer at all, is it?

A. Well, not to the average retailer. It depends entirely upon the firm.

Q. Well, then, is a fortunate firm, for some reason or other undisclosed, when you do make that sale direct to him, you recognize the fact that you put out of the running, as far as fair competition is concerned, the customers of the wholesalers dealing in your products to whom you do not sell?

A. Well, I have not gone into that matter. I have not given that any thought.

Q. Well, you recognize the fact, if for some reason, because of the largeness of the retailer, or because you like him as an individual, or for any reason appealing to your judgment, you sell to that retailer——

A. That is optional with us, yes.

Q. Then the retailer next to him, who happens to be a customer of your wholesaler customer, you recognize the fact that you destroy the equality of competition?

A. Well, not entirely, no.

Q. Now, it is your general policy, isn't it, when you sell to retailers in a town, you simply go around and take orders for your product?

A. Yes.

Q. But, through the regular wholesaler?

A. Yes.

Q. Your men are simply for the purpose of working up a favor of your product?

A. Yes.

Q. And that is a system of business that promotes sales of your product, which is in direct competition with other manufacturers of like products?

A. Yes.

Q. And that is your purpose?

A. Yes.

Q. Do you likewise send salesmen around to families, for the purpose of promoting it, and selling through the families in any neighborhood?

A. No.

Q. That is not done by you at all?

45 A. No.

Q. Now, when your salesmen take such an order, you do all the work of selling and all of that, but you take it to some particular jobber?

A. Yes.

Q. And usually, I assume, permitting the retailer to say to you who his jobber is?

A. Yes.

Q. If it is Raymond Bros.-Clarke Company, in Lincoln, why that would be the jobber that would make the delivery?

A. Yes, sir.

Q. And when you come in with that batch of orders from retailers, you make a sale to the wholesaler of sufficient to cover those orders, plus?

A. Not always.

Q. Well, sufficient to cover the orders?

A. Most generally he has got enough stock in the house to take care of them.

Q. That means, of course——

A. Reducing his stock.

Q. And the other stuff coming on—it either reduces his stock——

A. The sales made out.

Q. But your idea, as far as your house is concerned, is to create a demand for your stuff?

A. Yes, sir.

Q. And the sale of delivery is to the wholesaler?

A. Yes.

Q. And he gets it at the wholesale price?

A. Yes, sir.

Q. The retailer gets it at the resale price? That is true?

A. Yes, sir.

Q. So you are not selling to the retailer with a view of having that retailer on an equality with your distributor or your wholesaler?

A. I don't know what you mean by that.

Q. Well, I mean on an equality of price that he is getting it, and on terms.

A. We get the jobber's profit.

Q. That is, the jobber gets the jobber's profit?

A. Yes, sir.

Q. You realize that the wholesaler cannot sell your commodity to a dozen retailers in a given town, if that dozen retailers in that given town were in direct competition with a dozen other retailers handling your commodity at an advantage, as far as price is concerned?

46 A. Well, no. Of course, they would pay more for their goods to the jobber.

Q. That is, the dozen customers of the jobber would be paying a larger price.

A. Yes.

Q. For what they were getting——

A. Yes.

Q. Than the dozen competitors would be paying?

A. Yes. I understand fully what you mean.

Q. That destroys the ability of competition by the retailer, does it not?

A. Well, I don't know as it is destroyed any.

Q. What?

A. I don't know what you mean by "destroyed."

Q. Well, you know if you put a handicap on one fellow, if he buys goods under the same conditions existing between him and his competitor, as far as the location and ability to vend is concerned, the fellow who gets it the cheapest is the fellow who has the advantage?

A. In his profits; yes.

Q. Now, he is able to either sell at a higher profit——

A. At a higher profit; yes.

Q. Or, he is able to cut below what the other fellow can sell it?

A. Yes, sir; exactly.

Q. In other words, he can, if he desires to, make a greater profit than is fairly legitimate, or he can drive the other fellow out of business, just as he wills?

A. Well, I would not say drive him out of business.

Q. Would you say that if every producer of foodstuffs would go into the city of Lincoln and pick out a half dozen retail stores and sell their commodities direct to those half dozen stores and refuse to sell to the others, that the half dozen stores thus favored could not absolutely drive the others out of business?

A. No; I hardly think so.

Q. You think that they could live, notwithstanding?

A. Oh, yes.

Mr. REEVES. If your honor please, I am not making any objection to this on the ground that it is not proper cross-examination, because I feel that we ought to allow counsel plenty of latitude, but it seems to me that he is going a little far afield.

Mr. TINLEY. Well, I am only aiming to go as far as is perfectly legitimate.

47 Exam. BEEBE. Well, what is the purpose of this, if I may ask?

Mr. TINLEY. My purpose is this: He has testified to the business policy; the method of shipment, and the price, and all that; selling to some retailers and some not retailers; to the objection made by Raymond Bros.-Clarke Company that they would not buy his stuff if they sold to retailers. What I want to show is that the refusal to buy is based upon correct ideas of business, and is not in violation of the law. I do not think the witness can say that "I have been threatened with the refusal to deal in my commodities if I sold to some one else," because behind that legitimate reason—I do not think that he can simply sit tight on his statements of refusal, and charge

that to be a violation of the law without bringing out the purpose of it.

Exam. BEEBE. Well, I do not have any idea of limiting you necessarily in any way. In fact, under the recent orders of the commission, I can not do that to any great extent anyway, but I imagine that we want to get the record as short as we can, and get in everything that is necessary.

Mr. TINLEY. Yes; and I do not wish to go into anything that is not fairly legitimate. The charge here is unfair business practice, trying to coerce a manufacturer to refuse to sell to a wholesaler, because his refusing to buy——

Exam. BEEBE. Your idea—I thought I got your idea in the first place, but I thought there was a possibility of a charge by you of unfair competition against the Snider Company, and I was simply going to state to you that the doctrine of clean hands would not apply in a case of this sort. It is an ex parte proceeding by the commission, and if one party has a complaint of unfair competition against another who is a witness, that should be brought separately.

Mr. TINLEY. Yes; I realize that must be brought in some orderly way. The statute provides how it shall be done. I have never been in the habit of, when I am in trouble myself, trying to pass it on to somebody else. I first remove my own difficulty and then take care of other things afterwards.

(Former question and answer read by the reporter, as above recorded.)

48 By Mr. TINLEY:

Q. I am not assuming, Mr. Davis, that that is the practice and policy of your company. I do not assume that at all, nor do I understand that to be the fact. I understand your company's policy is to sell through the wholesaler.

A. Yes.

Q. And that that is your medium of distribution?

A. Yes, sir.

Q. Whether or not you have wisely selected that is immaterial. That is done by some of the officers of your company, and they have adopted that policy. Your policy is not to sell to retailers who come in competition with the customers of your distributing agencies?

A No.

Q. That is true, isn't it?

A. Yes.

Q. Now, then, what you do here, when the matter first came to your attention, was this charge of $100 as a commission or profit upon the sale to eighteen chain stores in the city of Lincoln?

A. Yes, sir; that is true.

Q. And you went to Lincoln for the purpose of settling that controversy?

A. I did.

Q. You knew that it was the policy of Raymond Bros.-Clarke Company to sell to retailers of merchandise?

A. Yes, sir.

Q. And that they were a wholesale establishment?

A. Yes, sir.

Q. You knew that their customers in the city of Lincoln were in direct competition with the eighteen chain stores?

A. Yes.

Q. What Mr. Raymond said to you in part of that conversation was that his customers could not compete fairly with the eighteen chain stores, if you were selling to them? That is true, isn't it?

A. I don't know. I don't remember the conversation. I do not remember that portion of it. It might have been.

Q. That was the effect of it?

A. It may have been; yes.

Q. Isn't it a fact that he told you "My customers can not compete with you—with your customers. I can not buy your stuff, or you cannot expect me to buy your stuff"?

Mr. REEVES. I object to that, if your honor please, on the ground that it is immaterial.

Mr. TINLEY. I do not mean "stuff" disrespectfully.

Exam. BEEBE. The objection will be noted. You may answer.

49 (Question read as above recorded.)

A. Possibly that conversation occurred.

By Mr. TINLEY:

Q. Now, do you know what percent of the total sale $100 would be?

A. Well, no; there was no percentage. Do you mean of the Basket Stores' invoice?

Q. Yes.

A. Well, it was not based on any percentage—what Mr. Raymond said.

Q. Simply a lump charge?

A. He simply said "I ask for $100."

Q. Have you at hand there the total wholesale price of the Basket Stores' shipment? I have it here in commission's Exhibit No. 1, amounting to $1,668.63. That item is correct?

A. I presume so; yes.

Q. Now, isn't it a fact that it is the fixed policy of your company that when you make sales to retailers and ship those invoices through a jobber or distribute through him, that he is allowed a per cent of profit?

A. On what kind of an order? An order of that nature?

Q. Well, I assume not of that nature, because that was not done in this instance?

A. No.

Q. But I mean as a general proposition, that if you take orders from a retailer——

A. And ship direct from the factory. Is that what you mean?
Q. You ship through a jobber?
A. What we call missionary work?
Q. Yes.
A. Oh, yes, on the missionary work.
Q. That missionary work means the taking of orders from the re
tailers?
A. From the retailers.
Q. And shipping through jobbers?
A. A retail order.
Q. But shipping through a jobber?
A. Shipping through a jobber. That is what we term a jobbe
retail order.
Q. As a general thing you do not ship direct to a retailer?
A. No, sir.
Q. That would be a violation of your policy?
A. Understand—I will qualify that. Not to retailers, as a gener
rule. You understand only in an instance like this——
50 Q. But the consumer, the Basket Stores Company, is a com
pany engaged in the operation of retail stores?
A. Yes.
Q. It simply meant there was more than one retail store under th
ownership and operation of that particular company?
A. Yes.
Q. As far as you were concerned though, you do not recognize tha
company as a wholesaler at all?
A. Well, I did for this reason, that they had a wholesaler's licens
Q. You are referring now to the permit under the Food Con
trol——
A. They had a retailers' permit and they also had a wholesaler
permit.
Q. (By Mr. REEVES.) From whom?
A. From the United States Government.

By Mr. TINLEY:

Q. You are referring to a permit under the food conservation a
of Congress?
A. Yes.
Q. But as a matter of fact, you recognize the concern is an operato
of retail stores?
A. Oh, yes.
Q. And you do recognize the distinction between a wholesale
fundamentally?
A. Yes.
Q. The distinction between a wholesaler and retailer?
A. Oh, yes.
Q. A retailer is one who generally sells to consumers?
A. Oh, sure.
Q. A large or small consumer?

A. Yes.

Q. And a retailer is one whose general business is to sell to retailers as a medium of distribution to the consumer?

A. Yes.

Q. That is the wholesaler, I should say.

A. Yes.

Q. You recognized and knew that the Basket Stores Company did not come within your understanding of what a wholesaler was?

A. I sold this order and I sold it to their general office, not to the retail stores. I sold it to their wholesale end of it.

Q. But you do not answer my question. You have said to me that the retailer, as generally understood, is one who sells, as a general problem, direct to consumers.

A. Yes.

Q. And that the wholesaler is one who makes a general practice of not selling direct to the consumer, but generally sells to retailers only?

A. Yes.

51 Q. That either may deviate from that without destroying the general characteristic?

A. Yes.

Q. You understand that?

A. I understand you.

Q. You understand that some wholesalers may occasionally sell to some retailer, or some consumer?

A. Yes. They sell to consumers occasionally.

Q. He might sell to employes in his house, or officers or relatives, or there may be some personal reason?

A. Yes.

Q. But as a general problem——

A. Or some big customer, where they are feeding a lot of men—wherever he can get a big order.

Q. But his sales, generally speaking, are to retailers only?

A. That is his general policy.

Q. The retailer is one who sells generally only to consumers?

A. Yes, sir.

Q. Large and small?

A. Yes.

Q. It was your understanding at that time that the Basket Stores Company was engaged in the operation of a retail grocery business?

A. Oh, yes.

Q. Now, then, the real controversy and the only controversy you had with this company was its right to charge you a commission on that sale?

A. Yes.

Q. That was your complaint and your only complaint?

A. No, I had a complaint on the discount, but I did not carry that very far.

Q. That is, he took a discount after the days had gone by?

A. Yes.

Q. Now, apart from that complaint, your only other complaint was charging you a commission on the handling of that goods for this retail bunch of stores, or company operating these retail stores?

A. Yes.

Q. Now let me dispose of the discount business. That is simply a cash discount, as I understand it?

A. Yes, a cash discount.

Q. If an invoice is paid in a certain number of days?

A. Ten days.

Q. You take off a certain per cent?

A. Yes.

Q. Now, quite a little controversy arose promptly with reference to the right to this credit of $100?

A. Yes.

Q. And that placed the matter in dispute, did it not?

A. It did.

Q. There were letters written by Raymond Bros. Company concerning that, that remained unanswered, I assume awaiting your visit, and the remittance was held up awaiting that?

52 A. Awaiting my visit?

Q. No. The remittance was held up awaiting the understanding from your house?

A. No; I think not.

Q. Well, you had nothing to do with that correspondence?

A. I had nothing to do with that.

Q. But, at any rate, the question of the right of the company to that discount, or the wrong of it, in taking it, was a matter that was dropped by you?

A. Oh, yes.

Q. And then the question arose whether or not, as a matter of right, law, and fair dealing, they had a right to a commission on that one sale?

A. Yes; for the reason that the goods were sold in Omaha.

Q. If I understand you correctly, there would have been no question in Lincoln?

A. Yes; the same question would have come up there. We reserved that right to sell the Basket Stores.

Q. Why do you say for the reason that the goods were sold in Omaha?

A. Well, that is the question that came up at that time.

Q. Well, then, that was not a material question in your determination?

A. The question at the time with Mr. Raymond was his understanding that I sold the Basket Stores at Lincoln. I told him, as a matter of fact, they were not sold in Lincoln; they were sold in Omaha.

Q. Well, there was no question about what the particular invoice was delivered or shipped to Lincoln?

A. Oh, the goods were shipped to Lincoln all right.

Q. To this particular retailer?

A. They were shipped to them all right.

Mr. TINLEY. I think that is all.

Mr. REEVES. I want at this time to make formal offer of Exhibits 3, 4, 5, 6, 7, 8, 9, 10, and 11.

Exam. BEEBE. If there is no objection, they will be received.

Mr. TINLEY. I think there is none, if your honor please. If you will just hold back Exhibit Number 3, there is no objection to the others. There is only one question, of the identification of some of the markings.

Exam. BEEBE. Then Exhibits 2 to 11, inclusive, except Exhibit Number 3, may be received at this time and marked. Are you offering Exhibit 3 in evidence?

53 Mr. REEVES. Not at this time.

Mr. TINLEY. The only thing that I had in mind was with reference to the question of the identification of that memorandum there.

Mr. REEVES. I make offer at this time, but on objection I am withholding it until Mr. Tinley makes an investigation. Now, I think some of these exhibits may be put into the record verbatim, as a matter of convenience. I think all of these letters should, as a matter of convenience, be copied into the record.

Exam. BEEBE. You had better read them in. The only way you can get them into the record otherwise will be to have them copied by the reporter separate, and have them attached as exhibits to the record.

Mr. REEVES. You think that they ought to be read into the record?

Exam. BEEBE. Yes.

Mr. REEVES. I will read then into the record commission's Exhibits 2 to 11, both inclusive; as follows [reading]:

(Shipping Sheet of the A. T. Snider Preserve Co. of goods consiged to the Raymond Bros.-Clark Co.)
"The T. A. Snider Preserve Co.

Ship to Raymond Bros.-Clarke Co.
In care of

Town Lincoln
State Nebr.

Date Shipped 10–4–18
Car No. and Initial
C. P. 208251

Car Seals 23093–4–5–6

Routing P. C. C. & St. L.
C/o C. & N. W. Ry.

Shipped From MAR
(Prep
Freight (Collec
Total Weight

Amount Prepaid 3
Register No
tax 9

324. 75

Name and Address	Customers Order No. or Mark	Catsup			Chili Sauce			Soup			Salad Dr.			Oyster C. S.			
		16 oz.	8 oz.	32 oz.	Gal	16 oz.	8 oz.	Gal	1 Tall		10	16 oz.	8 oz.	Gal	16 oz.	8 oz.	Gal
Raymond Bros-Clarke Co. Lincoln Nebr		200	100		5	25	10				10		5				
H. P. Lau Co Lincoln Nebr		100	25														
Grainger Bros Co Lincoln Nebr		125	25		10										10		
Basket Stores Co Lincoln Nebr						75	25		100		25	25		25	25		
Bradley-Hughey Co Nebraska City Nebr	(78)		25														
Blue Valley Merc Co Beatrice Nebr	(86)		15														
Total	BI	585	190		5	110	35		100		35	25	5	35	25		

Raymond Bros. & Clarke Co.
Credit Memo. for 10.00
% handling car to

(In red ink:) Frt. Bill 10–10–18 Paid (In red ink:) Reconditioning, labor, handling car—Inv. 10–21–18 #935.
(In red lead pencil:) Claim #2988 11–27–18 (In black lead pencil:) Car #138 (Opposite figures (78):) 11 short
Cr. M. 1/11/6/18 (Opposite figures (86):) 20 short Cr. Memo. 10/31/18

55 (Commission's Ex. 2—Cont'd.)

(Stamped across face, with rubber stamp, is:)
"Oct-4 1918."
(Written near bottom of sheet, in black ink, is:)
"Raymond Bros. & Clarke Co.
Credit Memo for 10.00
a/c handling car to
Fidler (?) 2/8/19
JMcD"

(Written in red ink near bottom of sheet is:)
"Frt. Bill 10-10-18 Paid
"Reconditioning, Labor, handling car. Inv. 10-21-18, $9.35"

(Written in black ink, are initials:)
"E. F. M."

(Written in black lead pencil is:)
"Car #138"
(Written in red lead pencil is:)
"Claim #2988 11-27-18."

(Two large blue-pencil check marks appear across face of sheet.)
(Portions of the right-hand side of sheet are torn off, and part of writing is gone.)

(On reserve side of sheet appears the following:)

585 cases 16 oz. Catsup	at 60	351.00		
				Paper cases.
190 cases 8 oz. Catsup	at 29½	55.10		
cases 32 oz. Catsup				
5 crts Catsup	at 86½	432½		
110 cases 16 oz Chilli	at 58	6380		
35 cases 8 oz Chilli	at 32½	1137½		
crts Chilli	at			
cases No. 1 Soup	at			
100 cases Tall Soup	at 67	6700		
cases No. 3 Soup	at			
cases No. 10 Soup	at			
35 cases 16 oz. Salad Dr.	at 56	1960		
25 cases 8 oz. Salad Dr.	at 32½	812½		
5 crts Salad Dr. at 92½		462½		
56 35 cases 16 oz. O. C. Sauce at 55		1925		
25 cases 8 oz. O. C. Sauce at 32		800		
crts O. C. Sauce at				
		612210		

Commission's Exhibit No. 3.

"The T. A. Snider Preserve Co.,
168 N. Michigan Ave.,
Chicago, Illinois.

Car Check Report.

"This Report is to be filled out properly and returned with Freigh Bill, with shortage and damage notations noted thereon over agent' signature. Original Bills of Lading issued on shipments destine to points beyond, must be sent to us with this report.

Consignee Raymond Bros. & Clarke Co.
Destination Lincoln, Nebr. Car Number CP20825
Distributed by Raymond Bros. Clarke Co.
Shipped from Marion Ind. Date 10/4/18
Via P.C.C. & St.L. c/o C.&N.W. Date of arrival 10/10X
Seal Record on Arrival 23093-4-5-6 Were Seals Broken N
Check each package for size and contents.
Shortages Cks 18 cs. 16 oz catsup B O 1/4 Doz 16 o catsup Broken Marked for Raymond Bros Clarke Co.
Damages Cks 10 cs 16 oz catsup B.O. 1 cs 8 oz Cocktail B.O. an 1/6 Doz 16 oz catsup Broken Marked for Bradley-Hughes Co Neb. City.

Remarks: Cks 20 cs 16 oz. Catsup B.O. 7/12 Doz. 16 oz. catsu broken Marked for Blue Valley Merc. Co. Beatrice. Bad Orde on Nebr. City & Beatrice shipments turned back to R. R. Co.

"Bills rendered for handling will not be passed for payment unti complete report is received.

"Eliminate correspondence by forwarding complete Report.

(Signed) Raymond Bros. Clarke Co.
per Harry Bradley, Claim Dept.
Signature of party making this report."

57 (On reverse side of sheet is the following, written in lead pencil:)

"R.B.C.

18 cs 16 oz catsup B.O.	18
3 Bottles Broke	11
Bradley Hughes	20
	49

11 cs B O (1 cs cocktail
2-16 oz. catsup Broke
Blue Valley
20 cs. 16 oz. catsup
7 Bottles gone."

Commission's Exhibit 4.

" Office of
" Raymond Bros. Clarke Co.
Wholesale Grocers.

Wm. H. Raymond, President and Treasurer.
I. M. Raymond, Vice President and General Manager.
Mrs. E. D. Raymond, Secretary.

Long Distance Telephone
B 6651

Main Office, Lincoln
Branch Office, Scottsbluff

" Lincoln, Nebr. Oct. 8, 1918.

" T. A. Snider Preserve Co.,
Chicago, Ill.

Gentlemen:

" We have at hand your favor of the 7th inst. regarding the distribution of car of your goods shipped to the city of Lincoln, and we are very much surprised to note in the same an order for the Basket Stores Co. of this city. This concern is nothing but a retail store, and we can not express our surprise that a concern like the T. A. Snider Preserve Co. would sell an outfit like this direct. We ask that you kindly send us credit slip for the regular jobber's profit on this order, and oblige,

Yours truly,

RAYMOND BROS. CLARKE CO.
By Wm H. Raymond."

58 (Printed on bottom of foregoing letterhead of Raymond Bro*d*. Clarke Co., is the following:)

" Member of
U. S. Food
Administration
License No. G06465."

(On reverse side of letter are the following figures, written in lead pencil:)

" 550000
256791
———
293209
436334
———
729543
436334
125
———
561 "

Commission's Exhibit 5.

(Letter written on letterhead of Raymond Bros. Clarke Co. Wholesale Grocers.)

"Lincoln, Nebr. Oct. 22, 1918.

"T. A. Snider Preserve Co.,
Chicago, Ill.

Gentlemen:

"On Oct. 7 we wrote you regarding credit memorandum for the number of cases of your goods sold to the Basket Stores of this city, but up to present time we have not received same, nor a reply from you.

"We also wish you would advise us of the amount we are to charge you for checking out, unloading and reshipping other jobbers' goods in this car shipped to us, and oblige,

Yours truly,

RAYMOND BROS. CLARKE CO.
By Wm. H. R."

(Stamped across face of letter appear the following:)

"Received Oct 24 1918 Mail."
"United States Food
Administration
License No. GO6465."

59 *Commission's Exhibit No. 6.*

(Letter on letterhead of Raymond Bros. Clarke Co., Wholesale Grocers.)

"Lincoln, Nebr. Oct. 22, 1918.

"T. A. Snider Preserve Co.,
Chicago, Ill.

Gentlemen:

"We enclose invoice covering bad order on our share of the catsup you recently shipped us.

"We also enclose original bill of lading and freight bill, covering damage to goods marked for Bradley-Hughes Co. of Nebraska City, Neb., and Blue Valley Merc. Co., Beatrice, Neb.

"Bradley-Hughes Company had 11 cases bad order (11-16 oz. catsup and 1-8 oz. cocktail, and 2 bottles 16 oz. catsup broken.)

"Blue Valley Mercantile Company had 20-16 oz. catsup and 7-16 oz. bottles broken.

"These goods we have turned oved to the Chicago & Northwestern Railroad Agent of this city, and it is possible, if you will take the matter up with him, that you can get him to re-cooper the cases and forward the goods on to these people. If not, please forward them credit memorandum, as we do not care to handle their portion of the claim.

Yours truly,

RAYMOND BROS. CLARKE CO.
By Wm. H. R.

Commission's Exhibit No. 7.

(Letter written on letterhead of Raymond Bros. Clarke Co.)

"Lincoln, Nebr. Nov. 16, 1918.

"T. A. Snider Preserve Co.,
Chicago, Ill.

"Gentlemen:

"Answering your favor of the 14th inst. regarding remittance on your account, this remittance will be made promptly when we receive a reply to our numerous letters sent to you regarding the
60 charge for checking out and handling this car, and credit slip for sales which you made direct to local retail Basket Stores of this city.

Yours truly,

RAYMOND BROS. CLARKE CO.
By Wm. H. R."

(Stamped across face of letter is:)

"Received
Nov 18 1918
Mail."

(The following notations appear in lead pencil, on face of letter.)

"10/4 1838.68"
"Oct.
21st.
9:35"

(Written in lead pencil on back of letter, are the following:)

"Harry B. Suttee
G 28403"
"Omaha 1.76"
"47"
"47
900
306 6"

Commission's Exhibit No. 8.

"November 18, 1918.

"Raymond Bros Clarke Co.,
Lincoln, Nebr.

Gentlemen:

"We have your letter of the 10th inst. and note that you are holding up our invoice of $1838.68 on account of some credits which you claim are due you. We do not believe that it is fair to hold up $1800.00 for those items which you claim are due you, which probably would not amount to more than $100 or $200 at the most and we would thank you to let us have remittance to cover our in-

voice and you may deduct these charge which you claim are due you, but you must give us invoices fully explaining why we should allow credit for these items.

61 "We would thank you to let us have remittance by return mail and if we find that your deductions are in order we will gladly accept your check. We will give same our immediate attention upon receipt of your check and invoices covering your claims.

Yours very truly,

THE T. A. SNIDER PRESERVE CO.

TBF:BA"

Commission's Exhibit No. 9.

"December 3rd, 1918.

"Raymond Bros. Clarke Co.,
Lincoln, Nebr.

Gentlemen:

"We are in receipt of your statement of November the 29th, together with check for $1590.42 which we return.

"We note that you have made a deduction of $110.68 for which you do not enclose a voucher.

"We wish you would kindly send us complete details on this deduction as we have no record of same.

"Regarding your deduction of $100.00 Commission on the order for the Basket Stores Co., would say that you are entirely out of line on the same. Their President, Mr. Williams, called on us some time ago after having been in Washington conferring with the Food Administration, they had a license for both of their branches, and we felt as though we were compelled to honor their order.

"You also deduct $27.58 past discount to which you are not entitled as the terms on your order are "10 days from date of invoice." There is $9.35 due you credited on our books, and we wish you would kindly make a deduction of this in sending us your corrected check.

Yours truly,

THE T. A. SNIDER PRESERVE COMPANY."

EJP.M.

---

62 *Commission's Exhibit No. 10.*

"Lincoln, Neb., Nov. 29, 1918.

"T. A. Snider Preserve Co.

We enclose remittance to cover the following bills:

Date	Amount		
10-4	1838.68		
		Draft	1590.42
		Disc.	27.58

Freight	
Misc.	110.60
Comms. on Basket Stores	100.00
Nebr City	
Drayage: Beatrice	7.00
Checking	3.00

Do Not Send Receipt.

Respectfully,

RAYMOND BROS. CLARKE CO."

(Across the face of the document the following stamped notations occur:)

" Received
Dec. 18 1918
Mail."
" Credit————————
Frt.————————
Ck. Amt. 1590.42
Contra Acct.————————"
" Received
Dec. 2 1918."

Commission's Exhibit No. 11.

(Letter on letterhead of Raymond Bros. Clarke Co.)

" Lincoln, Nebr., Dec. 16, 1918.

" T. A. Snider Preserve Co.,
168 N. Michigan Ave.,
Chicago, Ill.

" Gentlemen:

" We received yours of the 3rd inst. returning our remittance of Nov. 29, and we are again enclosing the remittance with this letter, and per your letter, we enclose statement for the ledger charges we have against you, and which we deducted.

63 " Regarding the $100 commission on the Basket Stores order will state, we certainly think we are entitled to this commission. Regarding the Basket Stores, there is no question but what they have a Food Administration License, because they do a large enough retail business to compel them to take out a license, but they are simply retailers in every sense of the word. They do not operate a wholesale store and never have. They may have a warehouse from which they distribute goods to their various stores, but they do not quote these goods to the trade, and do not sell to other retailers. If we had had any inkling or any suspicion that you would take an order from these people and ship direct and bill the goods to them direct, you never would have had a dollars worth of business from Raymond Bros. Clarke Co., for we do not intend to buy from manufacturers who compete with us for the retail business of our home

town, and if you do not feel inclined to give us the $100 on this car for our commission, we ask that you kindly give us shipping instructions for all the goods of yours that we have in our house. Regarding our deduction of discount, this was simply a matter of your own neglect. We wrote you immediately on receipt of your invoice regarding the commission on the Basket Stores goods, and regarding the delivery and checking out charges on this car, but we received no reply from you. Had we received your prompt reply, you would have received your money promptly.

Yours truly,

RAYMOND BROS. CLARKE CO.
By Wm. H. Raymond."

Redirect examination by Mr. REEVES:

Q. Mr. Davis, about this practice which you designated as "missionary work" for the jobber, I wish you would describe that at some length.

A. What we term "missionary work" or "retailers' work," we have salesmen on the road who will go into a town or a city and call on all of the retail trade and book our products through the different jobbers that are handling our goods.

Q. Does the jobber then asume the credit risk?

A. He assumes the credit risk.

64 Q. T. A. Snider Company, in other words, has the benefit of the guarantee of payment from the jobber, is that the idea?

A. No. These retail orders are complimentary to the jobber, against his stock. For instance, the jobber who has got a thousand case of our goods in the house, our man works the town and sell two or three hundred or five hundred cases, and *and* he just simply hands those in to him. They are handed in in duplicate, and the ones that are acceptable to him, his regular customers, or the merchant whose credit is good, he will submit the carbon copy and return to my office, to my salesman or myself, whoever happens to be there.

Q. Does this practice, missionary work, so-called, work to the advantage of the jobber and the manufacturer as well?

A. Oh, yes; it is a very expensive proporition.

Q. And enables him to get rid of his stock?

A. Yes, sir; it reduces the stock and gets it on the shelves of the retailer.

Q. Now, when you have a customer like the Basket Stores, which has, we will say, seventy stores, are you obliged to work those stores in the same way?

A. Oh, no. No, we never see them.

Q. Can you give us an idea of how expensive this missionary work is?

A. Well, if we had to depend entirely on missionary work, why unless there was a repeat business from the retailer, it would swamp us. It will vary all the way from ten cents a case to $2 a case.

Q. That is the expense of this so-called missionary work?
A. Yes, sir.
Q. Your benefits then come through the repeat orders?
A. From the consumer, yes. The consumers buy it from the retail grocer. That demand is created by advertising.
Q. That is, computing the cost of this missionary work on the initial sale, would in itself, entail a loss?
A. Oh, yes.
Q. If there were not a benefit arising from the repeat orders following?
A. Yes.
Q. In one of these exhibits which have been introduced, I notice a statement is made by Raymond Bros.-Clarke Company: "If you do not feel inclined to give us the $100 on this car for our commission we ask that you kindly give us shipping instructions for all goods of yours that we have in our stock" Were shipping instructions furnished in response to that letter?
A. No. They were their goods and not ours.
65 Q. You did not take back any goods?
A. Oh, no.
Q. Has the Raymond Bros.-Clarke Company continued to deal with the Snider Preserve Company since that transaction?
A. No; there has been no other transaction since that.
Mr. REEVES. That is all.

Recross-examination by Mr. TINLEY:

Q. Mr. Davis, you do this missionary work with the recognition that your product must be taken by the consumer?
A. Yes.
Q. Or else you are out of the game?
A. Yes.
Q. On the same theory that you advertise by different means?
A. Yes.
Q. Simply a sales method of popularizing your product, and getting it to the consumer?
A. Exactly.
Q. And having it in front of the consumer just as often and in as many places as you can?
A. Yes, sir.
Mr. TINLEY. That is all.

By Mr. REEVES:

Q. This missionary work, so-called, does not consist of soliciting trade from the consumer, does it?
A. Oh, no; we do not do that.
Q. Simply soliciting the retailer to buy——
A. Some concerns do that. We do not. We rely upon our advertising to have the consumer buy it from the retailer.

Q. I am not sure whether you stated or not whether this $100 had been paid?

A. No.

Q. What are the facts with reference to that?

A. Well, it has never been paid. That is, it has never been returned to the Snider Company.

Q. Now, about this so-called missionary work, during the course of that work, do you solicit the trade of hotels and restaurants?

A. Oh, yes.

Q. As well as retail grocers?

A. Yes, sir.

Mr. REEVES. That is all.

By Mr. TINLEY:

Q. Well, there is more than $100 unsettled account between the Snider Company and Raymond Brothers, is there?

A. What is it?

66 Q. There is more than $100 in controversy between Snider and Raymond Brothers?

A. I don't know.

Q. Isn't it a fact that Snider owes Raymond Brothers more than $200 outside of that item?

A. What for?

Q. You perhaps don't know anything about it?

A. If you will mention it, probably I can tell you.

Q. Well, unless you have knowledge of the details of the controversy——

A. I do.

Q. Don't you know that they have a claim against you for some couple of hundred dollars outside of that item?

A. What for?

Q. A credit slip on account of decline in the price of goods?

A. Oh, yes; I understand that.

Q. And that is withheld on account of this item of $100 isn't it?

A. Oh, no.

Q. You have no doubt of the solvency of Raymond Brothers and their ability to respond if they are liable?

A. Oh, no; they are perfectly solvent.

Q. There is no doubt on that question?

A. No; there is no doubt about that.

Q. You are not commencing this controversy simply to collect the hundred dollars?

A. Oh, no. We recognize they are good. There is no question about that.

Exam. BEEBE. I might state as a result of that question, that I am not advised of who was the informal applicant in this case. As a matter of fact, that is not made public by the commission, and it is just as possible that the Snider Company had nothing to do with making the informal complaint, as not. I don't know, of course.

It is not incumbent upon them to disclose whether or not they are the informal applicants.

Mr. TINLEY. Why, it would be wholly immaterial, I apprehend, who charged a man with burglary, if he was committing the crime.

Exam. BEEBE. Of course the commission is always in possession of the facts as to that, but I simply want to state that, so that it may be clear, that it may or may not have been the Snider Company who were responsible for the informal complaint. Is that all?

Mr. TINLEY. That is all.

Mr. REEVES. That is all with Mr. Davis.

67 (Witness excused.)

Exam. BEEBE. We will take a recess now for lunch until 1.45 this afternoon.

(Whereupon, at 12.15 p. m. a recess was taken until 1.45 p. m.)

After recess, 1.45 o'clock p. m.

Exam. BEEBE. You may proceed.

Mr. REEVES. I will call Mr. Williams.

WALTER D. WILLIAMS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. REEVES:

Q. Give your full name to the reporter.

A. Walter D. Williams.

Q. Where do you live, Mr. Williams?

A. Omaha.

Q. What is your business?

A. I am in the grocery business.

Q. What is the Basket Stores Company? Is that a corporation or partnership?

A. It is a corporation organized under the laws of Nebraska, wholesalers and retailers of all kinds of merchandise.

Mr. TINLEY. I move to strike the statement of its powers, as incompetent and not responsive, and not the best evidence.

Exam. BEEBE. The motion will be considered by the commission.

By Mr. REEVES:

Q. Are you an officer and stockholder in that corporation?

A. I am president of the corporation, and stockholder.

Q. State generally the business that that corporation is engaged in.

A. It is in the wholesale and retail of all kinds of merchandise; groceries, meats, produce, and candies.

Q. Food products, you mean?

A. Food products, of all kinds.

Q. In regard to where you purchase your supplies, do you purchase them outside of the State of Nebraska or inside of the State of Nebraska?

A. A large percentage outside.

68 Q. About what percentage, approximately, do you purchase, of your supplies, outside of the State of Nebraska?

A. I can not give you the exact percentage, but I should say considerably over fifty per cent.

Q. When goods are purchased by you, they are then transported to what point?

A. To our warehouse in Omaha.

Q. Does the Basket Store Company have other places of business besides its Omaha stores?

A. We have a branch warehouse at Lincoln.

Q. Have you retail establishments in Omaha and other places?

A. We have.

Q. About how many?

A. About 72.

Q. Are any of them located outside of the State of Nebraska?

A. Yes, sir.

Q. How many are located outside the State?

A. Four.

Q. In what State are they located?

A. In Iowa.

Q. Now, when the supplies are purchased and shipped to Omaha for distribution, then what takes place?

A. They are reshipped to our stores, and to others who purchase from us.

Q. Do you have customers who buy from you in wholesale quantities?

A. We do.

Q. About what percentage of your present business is done *done* with customers outside of your own organization?

A. I can't give you any percentage.

Q. Can you state approximately? That is, as to the volume of business?

O. I should say somewhere near ten per cent, or more.

Q. Now, as to the volume of business, can you state approximately the volume of business done by the Basket Stores Company in a calendar year?

A. About two and a half million.

Q. How long have you been engaged in the grocery business, Mr. Williams?

A. I started about July 1st, 1917. Is that right, Mr. King?

Mr. KING. Yes, sir.

69 By Mr. REEVES:

Q. What business were you in previous to that date?

A. I was in the chain-store business.

Q. Grocery chain stores?

A. Groceries, and teas and coffees.

Q. Are you familiar generally with the wholesale grocery business in the districts and communities adjacent to Omaha?

A. I must say that there seems to be a special arrangement of doing business in the Missouri River Valley.

Q. Different from other communities?

A. Different than the eastern States.

Q. Well, what I was undertaking to get at is this: How does the volume of business of two and one-half million dollars compare with that of the wholesale grocery establishments of this Missouri River district?

Mr. TINLEY. That is incompetent, irrelevant, and immaterial, and the witness is incompetent.

Exam. BEEBE. The objection will be noted. You may answer.

A. I would be unable to give you any definite information as to the volume.

By Mr. REEVES:

Q. In your judgment, is the average wholesale grocery establishment in Omaha and vicinity, and the volume of business in a year, equal to two and a half million dollars?

Mr. TINLEY. The same objection. The witness is incompetent.

Exam. BEEBE. The objection will be noted. You may answer.

A. I cannot give you the fact.

By Mr. REEVES:

Q. Of course, if you have no personal knowledge——

A. I have no figures, only from hearsay. I am not competent to answer that. I do not know.

Q. How do you buy your supplies? In carload lots, quantities, equivalent to those in which the wholesale grocers generally purchase their supplies?

A. Nearly all of ours. I should say all of them, are purchased in that manner.

70 Q. Are all of your supplies purchased direct from manufacturers or brokers, or do you have occasion sometimes to purchase some locally or through a local jobber?

A. Our pick-up business is quite large for the reason that we are out of goods and we have to have them. Our shipments are delayed, and one think or another, and we buy, of course, from jobbers.

Q. Is that known as pick-up business?

A. Yes, sir.

Q. About what percentage of your total purchase does that amount to? Just as a matter of explanation, what have you in your hands at this time?

A. This is a report from our office accountant.

Q. Concerning what?

A. Purchases that we made locally in Omaha and Lincoln in 1918.

Q. Does that serve to refresh your recollection as to these matters?

A. Yes.

Q. By referring to that paper can you then answer the question which I asked you?

A. I think I can.

Q. Well, proceed to give us——

A. Our purchases from local jobbers in 1918 averaged 34.57 pe cent of our total. Our purchases in the same period for Lincol 1918, averaged 18 per cent.

Q. For what period did you state?

A. 1915.

Q. You have not the figures then for 1919?

A. In 1919, in Omaha it figures 36.92 per cent. In 1919 in Lincol it figures 7.7 per cent.

Q. Now, are some of these Omaha purchases direct from the manu facturer or all of them through the jobber?

A. I will have to ask my accountant on that.

(Question read as above recorded.)

The WITNESS. The figures that I gave you, included in thos figures are the purchases that we have made from brokers and manu facturers' agents in Omaha.

Q. (By Mr. REEVES.) Do you have occasion to sell any goods a all made in Omaha, which you purchased direct from the manu facturer in Omaha?

A. Well, I couldn't say offhand.

Q. The item I had in mind was flour. Do you handle any flou made here?

A. We buy flour manufactured in Omaha, and other items

71 Q. You buy that direct from the manufacturer, or through a jobber?

A. Direct from the manufacturer.

Q. Is that included in these totals of percentage that you gave?

Mr. TINLEY. It may be more in keeping if one witness would testify to what he knows than to have some other witness fill in the gap.

Mr. REEVES. Well, it is a formal matter, and I thought perhap we could facilitate matters in this way.

(Question read as above recorded.)

A. It is.

Q. (By Mr. REEVES.) Now, then, you buy commodities through local jobber; what sort of a price does the jobber make you?

A. Well, I myself am not a buyer.

Q. Well, you have observed what the practice is in your office have you not?

A. Yes, sir.

Q. What is that practice?

A. If we are compelled to take a car through a jobber, he make a very small percentage of profit.

Q. What do you call a small percentage? One per cent or two per cent?

A. From one per cent to two per cent.

Q. How does that compare with the percentage of profit which jobber makes when he sells to a retailer?

Mr. TINLEY. That is incompetent and a conclusion of the witness.

Exam. BEEBE. The objection will be noted. He may answer if he can.

A. I do not know.

Mr. REEVES. I think you may cross-examine.

Cross-examination by Mr. TINLEY:

Q. Where are these seventy-two stores located?

A. 26 in Omaha and Council Bluffs; about 17 in Lincoln, I believe; and the remaining in the States of Nebraska and Iowa.

Q. Can you give me the cities, with approximately the number of stores in each?

72 A. Take Council Bluffs, there are two; Onawa, one; Ponca, Nebraska, one; Hardington, one; Bloomfield, one—these are all in Nebraska and all one store: Neely, North Bend, Cedar Bluffs, Wahoo, Ashland, Greenwood, Seward, Aurora, Sutton, Seransville, Ord, Burwell, Fairbury, Wymore, Beatrice.

Q. How many in Beatrice?

A. One. Tecumseh, Table Rock, Fall City. That is all I can think of.

Q. Is it 26 in Omaha without Council Bluffs, or 24?

A. Well, I can't remember without looking over the list. I think it is about 26, including Council Bluffs. I am not sure.

Q. Now these stores in Omaha are not located in any one special location, but scattered throughout the territory?

A. Throughout the city.

Q. In view of having 26 good retail points?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. And the 17 stores in Lincoln are scattered throughout the city with a view of selecting good retail locations for the seventeen?

A. Yes, sir.

Q. There are other retail stores in Omaha and in Lincoln?

A. Yes, sir.

Q. Quite a number?

A. Yes, sir.

Q. And they are scattered throughout the two cities?

A. There are also chains in Lincoln; several chains in Omaha—chain stores.

Q. But you did not answer my last question. The retail stores in Lincoln and in Omaha are scattered throughout the city?

A. Yes, sir.

Q. Most of these other places that you have named are small towns; the largest is perhaps 5,000 people. That is true, isn't it?

A. Yes, sir.

Q. Some of them get down to small cities or towns of 1,200 people?

A. Yes, sir.

Q. And in those cities are also other retail stores dealing in t
same kind of merchandise?

A. Yes, sir.

Q. In those stores you are selling direct to the consumer?

A. Yes, sir.

Q. And you are in direct competition with the ordinary ret
store?

A. Yes, sir.

Q. That is true with your seventy-odd stores?

A. We are in competition with them in wholesale and ret
business.

Q. Well, you are in direct competition with them in retail; is th
not true?

A. And wholesale.

73 Q. Well, that does not qualify my statement that you are
direct competition with them in the retail business.

A. Yes, sir; retail and wholesale.

Q. Are they in the wholesale business?

A. They are because they are buying produce, and so are we,
wholesale.

Q. Are they selling to others for resale?

A. I didn't get that.

Q. Are they selling to others for resale?

A. They are buying from others and selling.

Q. They are buying from others for resale to consumers?

A. To consumers, and to wholesalers.

Q. Name me one retail store in Omaha that is buying from othe
for the purpose of wholesaling.

A. You spoke about the small country town——

Q. I am asking you now to name me one store in Omaha that
buying for the purpose of selling to wholesalers.

A. I don't think I can recall any one in the city of Omaha.

Q. Name me one in Lincoln.

A. I think that the Farmers' Supply Company do.

Q. That is a cooperative store?

A. I don't know what kind of a store it is.

Q. Can you name me another?

A. The Liberty Stores.

Q. What is the Liberty Stores?

A. It is a chain of stores in Lincoln.

Q. Do they sell to consumers?

A. They buy produce at wholesale and sell it.

Q. What produce do they buy?

A. Butter, eggs, and poultry.

Q. Do they deal in merchandise—general foodstuffs? For fam
lies?

A. They do.

Q. Do they sell to consumers or to dealers?

A. I think they sell to both.
Q. That is, the country store also takes butter and eggs?
A. Yes, sir.
Q. And poultry?
A. Yes, sir.
Q. From the farmers, and ships it or sells it to other dealers?
A. Yes, sir.
Q. Now, aside from dealing in commodities of that kind, are they dealers, selling direct to consumers, or selling to retailers?
A. I couldn't say as to that.
Q. Now, what do you sell to wholesalers?
A. Butter, eggs, and poultry.
Q. That you take in at your country stores?
A. Yes, sir.

74 Q. Now, that is the common practice throughout the Central West for the country store to buy from the farmer butter, eggs, and poultry?
A. Yes, sir.
Q. And to sell that to a jobber usually?
A. To the commission men and the wholesaler.
Q. That jobber is the distributing agent who sells to retailers?
A. I don't think he does, to retailers direct.
Q. Well, take it, for instance, in the poultry line. Have you sold to the Skinner Company here, and that company in turn would sell to the different retailers?
A. I presume so.
Q. That is a system of handling produce of that kind?
A. Yes, sir.
Q. Now, then, you in that respect are simply dealing as an ordinary country store does when you are dealing in these country towns?
A. Well, we buy and sell poultry and produce, both wholesale and retail.
Q. Now, outside of poultry and produce of that kind, are you engaged in the business of selling to consumers or not?
A. We sell to consumers and to wholesalers and dealers and individuals.
Q. And outside of those commodities, what do you sell to wholesalers?
A. We sell different items.
Q. Well, what items?
A. Well, I don't believe it would be good business for me to answer, when it apparently has been shown here that one jobber has boycotted a manufacturer for selling us. I do not think I should be compelled to answer such a question.
Exam. BEEBE. Well, he is not asking you to give the names of any manufacturers. He is asking you to give simply the names of commodities.
A. We sell sugar, cereal, soap, syrups in ten-case lots or carloads.

By Mr. TINLEY:

Q. To individuals or to dealers?

A. To individuals, to dealers, or any one who wishes to buy it.

Q. Well, is that your business of selling to dealers, or selling to consumers?

A. Our business is wholesaling and retailing merchandise.

Q. You have been advertising right straight along, cutting out the middleman entirely, haven't you?

75 A. I think we have.

Q. That is your general policy, isn't it, of presentation to the public?

A. I think so.

Q. In cutting out the middleman you have reference to cutting out the wholesaler?

A. Yes, sir.

Q. That means cutting out yourself as a wholesaler, isn't that true?

Mr. REEVES. That is a matter of argument, if the examiner please.

Exam. BEEBE. Yes, I think it is. He has testified that he sold it wholesale, and he so advertised.

By Mr. TINLEY:

Q. What do you mean by "cutting out the wholesaler"?

A. I mean we were trying to distribute the goods from the manufacturer direct to the consumer at the least possible cost.

Q. What you mean then is, taking it direct from the producer, and through your medium of retail stores selling it to the consumer without the intervention of the jobber or the wholesaler?

A. Yes, sir.

Q. And that is the purpose of your business?

A. Largely so; yes.

Q. That is your declared purpose to the public?

A. Yes, sir.

Q. Now, you have said to us that you purchased in 1918 34 per cent plus of your entire output in Omaha from jobbers?

A. Yes, sir.

Q. That is from wholesalers?

A. Yes, sir.

Q And that represents your pick-ups, as you call them?

A. Yes, sir; a large percentage of it does.

Q. Now, let us understand clearly what you mean by "pick-ups."

A. It means goods that we are out of and also goods that we have been unable to buy direct from the manufacturer.

Q. Then you frequently find yourself out of stuff?

A. Yes, sir.

Q. Under your method of buying?

A. Yes, sir.

Q. That requires you to employ a distributing agency of the wholesaler?

A. Yes, sir.

Q. If you did not have the wholesaler you would simply be short on that stuff, and the market would be without it?

A. We are already short of it, with the wholesale man here.

76 Q. You buy it from him because you are out; delayed shipments or some other reason?

A. Some reason given that they wanted to supply their own customers, and do not want to give us the goods.

Q. But that does not apply where you get the goods?

A. No; not at all.

Q. That is what we are talking about. Keep your mind on that subject, please. Where you get the goods, part of the reason is, or some of your reasons, or your [rea-] some of the time is that you are out of it, because of delayed shipments?

A. Yes, sir.

Q. Under occasions of that kind, without the existence of the wholesaler as a distributing agent, you would be short on this market?

A. Yes, sir.

Q. And it applies to the extent of 34 per cent in the city of Omaha, or did in 1918?

A. Those figures include the purchase of flour, and we purchased in one month flour amounting to $10,000.

Q. Now, if you are going to go into figures it is going to compel me to go into your books, and I do not want to do that unless I have to. My question simply asked you whether that was 34 per cent plus in 1918?

A. Yes, sir.

Q. Now, the purchase of flour is from the mills?

A. Yes, sir.

Q. The retail dealers as a class, make their flour purchases in the same way, do they not?

A. I don't know, sir.

Q. Don't you know as a matter of fact flour is supplied by the mills direct to retailers and not through the intervention of wholesalers?

A. I couldn't say, sir.

Q. You don't know one way or the other about that?

A. No, sir.

Q. Now, you also buy meats direct from the producer?

A. Yes, sir.

Q. That is the packing companies?

A. Yes, sir.

Q. The packing company sells to the local butcher or retailer?

A. Yes, sir.

Q. All through this territory?

A. Yes, sir.

Q. So you buy your meats exactly the same as that retailer does?

A. Yes.

Q. What percentage of your business is constituted by meats?

A. I can not give you the figure.

Mr. REEVES. Can you approximate it?

Mr. TINLEY. I do not expect you to be accurate to the dollar, o anything like that.

77 The WITNESS. Why, I should think about 25 per cent.

By Mr. TINLEY:

Q. Of your total business?

A. Yes.

Q. Now, what per cent of your total business was made up o flour?

A. I couldn't give that off-hand.

Q. You can give me no idea? What percent of your total busi ness was made up of sugar?

A. I should think those two items about 10 per cent.

Q. Sugar you buy direct from the brokers?

A. Yes, sir.

Q. For the last few years that has been sort of a Government con trolled commodity?

A. Are you asking me that question?

Q. That is true, isn't it?

A. It has the Government fixed distribution board, but they re fused to distribute to us, but did give other stores sugar the last si months. If you want to know the percentage, we were using 250 t 300 bags a day, and we got 50 bags a week.

Q. You ought to file your complaint against the Government fo that.

A. We have.

Q. Now, to what do you refer—to what sale do you refer when yo say that you make wholesale sales?

A. We sell items that other dealers want in ten case lots or fift case lots, or hundred case lots, or a car.

Q. Can you give me an instance of that?

A. I don't know what you mean.

Q. I would like to have some instances of what you mean by tha

A. Why, if a dealer wants syrup or cereals or some other ite he is out of and wants our, we sell it to him.

Q. Could you name one instance where you sold to a retailer?

A. We have sold to Hayden Brothers and we have sold to Culle and we have sold to the Omaha Cold Storage people and othe dealers.

Q. What percentage of your business do sales of that kind amou to?

A. I couldn't say.

Q. As much as one per cent, do you think?

A. I should think so, and more. I think I already stated that thought it was about ten per cent.

Exam. BEEBE. Yes, he said before about ten per cent.

The WITNESS. I am not sure, but I think about that.

By Mr. TINLEY:

Q. Now, in your advertisement, as a general rule, you run leaders every day, do you not, or every time you advertise?

78 A. Well, we do sometimes, yes.

Q. Don't you as a rule say "This is preserve week," or "This is tea and coffee week"; advertisements of that character?

A. I believe so.

Q. Now then, you quote commodities of that class in that advertisement as a rule?

A. Yes, sir.

Q. And as a rule then you are quoting these commodities at a price which is almost the same as the wholesale price?

A. I presume so, in some cases.

Q. In other words, you are using those articles at that time for leaders?

A. Yes, sir.

Q. And not claiming or exacting the cost and profit off of those items?

A. I don't understand your question.

Q. Well, there is a certain cost and profit that you must have, or profit that you must have over and above the cost, to represent your selling cost—selling expense; isn't there?

A. There is.

Q. Now, isn't it a fact that on these leaders, the margin of profit is insufficient to meet that selling cost?

A. I don't think I should be compelled to answer that question. It is going into the confidential information of how we handle our business.

Exam. BEEBE. No, I do not see that that would make any particular difference. You have already testified that it was very near the cost price. I do not see that it would be any hardship to answer that question.

A. What was the question?

(Question read as above recorded.)

A. At times it is.

By Mr. TINLEY:

Q. That is in sales to consumers, isn't it?

A. I don't believe I understand your question.

Q. Well, you told me that it was less than the selling cost, the margin of profit was less than the selling cost. By that you mean you are selling to the consumer for less than cost, those particular articles?

A. Well, we might sell those leaders to induce you to come there and buy it on that particular day.

Q. For less than the selling cost?

A. We might.

Q. That is, for less than cost, you are selling your leaders to the consumer?

79 A. We are not selling leaders. We might sell all of our line at a certain time at a close margin to get you to try our goods.

Q. I don't care what your object is. It is immaterial. What I want to know is if it is not a fact that your policy of advertising is every week to advertise in substance: "This is coffee day," or "This is Snider Preserve Company Products day," or something of that kind?

A. Yes.

Q. Now, on those days, in these ads, you would run a list of the different products coming within the denomination of that head, giving prices at which you are offering to sell?

A. Yes, sir.

Q. And those prices would be less than cost?

A. I couldn't say that.

Mr. REEVES. If the examiner please, I think the question is not quite clear or fair. What he means by "cost" is the original cost plus the selling expense.

Mr. TINLEY. Yes; I mean the original cost plus the selling expense.

By Mr. TINLEY:

Q. That is true, isn't it?

A. I don't believe I got your question. Do you mean that we are selling these goods at actual cost that we buy them at?

Q. No; I mean for less than actual cost, including the cost of the product plus the selling cost—the cost of doing business.

Mr. REEVES. I cannot see the materiality of this. I do not object to a limited inquiry along these lines.

Exam. BEEBE. Well, it seems to me that he has answered this question once.

Mr. TINLEY. I do not think he has, if your honor please.

The WITNESS. I think what he wants us to tell him is do we lose money on it when we have that sale. I do not think we should give our method of figuring in this hearing.

Mr. TINLEY. No; I am not putting that question to you. I want to know if it is not a fact that on the leaders that you are advertising, that you are selling those for less than the actual cost of the goods plus the cost of doing business?

A. I coudn't say.

Q. What did you mean a few moments ago when you said that you were selling those leaders for less than a profit sufficient to cover your selling cost?

80 A. Well, I wish to withdraw that statement and state in its place that I am not able to tell you.

Q. Allow me to call your attention to an advertisement in The Journal, February 8, 1919, "Basket Stores Company. Snider's tomato soup, 10 cent can, 12 cans for $1.14." Do you mean to say that

that was not less then the actual cost of the goods plus a sufficient profit to pay the cost of doing business?

A. I say that I am unable to answer the question; that I do not buy these goods, and without the records I can not say.

Q. Now can you tell me what the annual dividends of your company are? What annual dividends your company pays?

Mr. REEVES. I do not think that is proper inquiry.

Exam. BEEBE. Yes; I will sustain the objection to that.

Mr. TINLEY. My purpose in that is this: I want the record to show the purpose, for further presentation to the commission. What I wish to show is that the Basket Stores Company are selling at retail, direct to consumers, advertising commodities purchased in carloads from producers, for sale at less than the cost of the commodity plus the selling cost, and yet are making large profits in the conduct of their business. I offer it for the purpose of showing that the concern is purely a retail concern, organized for the purpose of establishing a monopoly in their business.

Exam. BEEBE. I cannot see that the question of profits—the percentage of profits has any relation to the fact as to whether or not they are conducting a purely retail business.

Mr. TINLEY. It has a bearing I think—if you will bear with me—upon the charge in this information that we are guilty of unfair trade practices in making the statement to the Snider Company that we would not buy from the Snider Company if they sold to the Basket Stores Company, because the claim is made that the Basket Stores Company was destroying the competition of customers of the wholesalers and destroying his ability to compete.

Exam. BEEBE. You are trying to show that the Basket Stores Company are not doing business at a loss?

Mr. TINLEY. No; I am trying to show that they are doing business at a profit, to establish this method of destroying competition with customers of these particular wholesalers who are complained against.

81 Exam. BEEBE. Well, the ruling will stand. The objection will be sustained. You may ask him, if you wish, whether or not the Basket Stores are making a profit. It seems to me the question of the exact percentage of profit that they are making is something that has no bearing or not sufficient bearing upon the case to overcome the fact that it is something which is confidential in its nature.

Mr. TINLEY. You have a great many stockholders, haven't you?

The WITNESS. Yes, sir. Do I understand, Mr. Commissioner, that we are on trial? The Basket Stores on trial, when this jobber has withheld our goods that we paid for, for over thirty days, without notifying us, or giving us the privilege of using these goods?

Exam. BEEBE. No; there is no question of your being on trial.

The WITNESS. We did not file this complaint against Mr. Raymond.

Mr. TINLEY. We are not inquiring into that at all.

The WITNESS. It seems to me that this is going into a line that I ought not to have to explain to him, but I answered this question.

Exam. BEEBE. Well, the objection is sustained.

By Mr. TINLEY:

Q. I understand that you have a large number of stockholders?

A. We have.

Q. There is no secret as to the amount of dividend that you are paying each stockholder?

A. No, sir.

Q. That information is given to each stockholder, and as far as you know, is public property, isn't it?

A. I should suppose so.

Q. Now, can you tell us what has been your annual dividend paid on stock?

Exam. BEEBE. Well, you asked before for the amount of profit, didn't you, that the corporation had made?

Mr. TINLEY. Yes. I want now to show the dividends. It is not a secret or in any way a secret matter. It is a matter that is public.

Exam. BEEBE. You have no objection to answering?

82 The WITNESS. I have. I think that is a matter that is secret to the stockholders of the corporation.

Mr. REEVES. If he objects to giving it I will interpose an objection. I thought probably he would not object to it.

Exam. BEEBE. I can not see that it has any bearing on the case. I will sustain the objection.

Mr. TINLEY. I want to show that he is making a profit, because dividends must come from profit. It does not necessarily show the extent of profit, because he may not declare dividends to the full extent, but it is a matter that is not secret. It is public.

Exam. BEEBE. Is this matter public? The amount of dividends that is paid?

The WITNESS. I think not.

Mr. SMITH. If the commissioner please, the amount of dividends that they pay is, of course, known to their stockholders, but I can not conceive how it is at all pertinent to this inquiry. Here is a matter that is primarily between the Snider Preserve Company and Raymond Brothers. We are in here as witnesses to this proposition. Why should it be necessary for us to disclose our affairs at all, I can not conceive.

Exam. BEEBE. I do not want to let that statement stand, that this is a matter between the Snider Company and the respondent in this case, because it is not in any sense a matter of that sort. It is a matter purely between the Federal Trade Commission and the respondent.

Mr. SMITH. Yes; of course you are right.

Exam. BEEBE. As far as I know, the Snider people were not the complainants. I do not know who was the complainant. I do not

know that the Snider people were not. I will sustain the objection. I can not see any materiality to this.

Mr. TINLEY. The defendant excepts and gives notice that it will insist upon a reexamination for the presentation of this matter in the record.

Exam. BEEBE. Let it be noted and it will be considered by the commission.

Mr. TINLEY. As I understand, I wish always to keep within the correct ruling.

83 Exam. BEEBE. Yes. Now, I do not know that I have stated it before in this case—you undoubtedly have a copy of the old rules of practice of the commission. I have recenly been instructed by the commission that questions of evidence are not be ruled upon by the examiner, but are to be reserved for the commission, except in such cases as where the question involves the bringing out of some confidential information that might be used in some way to the detriment of the witness, or of any of the parties either involved or not involved. Although as a general rule on your objections, I have simply been making the statement that they will be considered by the commission, I have ruled upon these two questions, upon the basis of the authority given me in that respect.

Mr. TINLEY. I will not insist upon anything that might be a trade secret or names of customers, or avenues of charges that might possibly result in embarrassment to this man or anybody else. I do not wish to crowd this any further, but I propose, when I establish the fact that it was public property, there could be nothing detrimental.

Exam. BEEBE. If I were convinced that it were a matter of public record I would not have sustained the objection, but if it is not a matter of public record, it seems to me that it might accrue to the damage of the Basket Stores Company in this respect—and that is the ground of my ruling—that it might be used as propaganda or in advertising among consumers that if the Basket Stores Company have been making large profits, that they have been making tremendous profits, that they are getting more profits than the other retailers, and might result to their detriment, and it is on that basis that I have given my ruling on that question.

Q. (By Mr. TINLEY.) Why, you have advertised publicly in the newspapers your stock, describing it as seven per cent stock, haven't you?

A. Yes, sir; preferred stock.

Q. That is the preferred stock?

A. Yes, sir.

Q. So that on all preferred stock that is outstanding, you have been paying seven per cent?

A. Seven per cent.

Q. Do you know what is the amount of your preferred stock?

A. Something over $500,000.

Q. Then, you have also a considerable quantity of common stock?

A. Yes, sir.

84 Q. Now, that is held by a very large number of people isn't it?

A. By a good many.

Q. And you send out your dividend checks to those people without any restrictions as to secrecy or anything else, don't you?

A. We send them to the stockholders.

Q. Your stock is bought and sold in the market, is it not?

A. Not that I know of.

Q. Now, that common stock pays a dividend too, doesn't it?

The WITNESS. I object to answering that question.

Exam. BEEBE. Well, as the question is, you may answer it yes or no. Does it pay a dividend?

A. It does when it earns it.

Q. (By Mr. TINLEY.) Well, has it paid a dividend in 1918 and 1919?

Mr. REEVES. If the witness is of the opinion that it woud be improper to answer that question, I will interpose an objection, but if the witness is not of the opinion that it would not embarrass him to answer the question, I will not interpose the objection.

Exam. BEEBE. I will require him to answer the question. Has it paid a dividend in 1918?

A. It has not.

Q. Or 1919?

A. It has not.

Q. (By Mr. TINLEY.) You commenced business in 1917?

A. Yes, sir.

Q. Now, has it accumulated a surplus in the surplus account that has not been distributed in the form of dividends, after paying the seven per cent on the perferred stock?

Mr. SMITH. On behalf of Mr. Williams, I shall object to that question. It strikes me it is entirely immaterial to this inquiry, if your honor please; that their buying and selling as wholesalers and retailers, whether we make money or do not make money is immaterial as to whether we are wholesalers or retailers. It is entirely immaterial to these respondents. I do not think because the witness happens to be in court that he can be cross-examined regarding his private affairs as to the success or nonsuccess of his business.

The WITNESS. We have been refused——

85 Mr. SMITH. Let the court rule, please.

Exam. BEEBE. I will sustain the objection.

Q. (By Mr. TINLEY.) Now, can you tell me with what regularity you run advertisements in the Omaha papers and in the Lincoln papers?

A. I should say at least once a week.

Q. And the fact is that it is generally twice a week, with regularity on particular days, isn't it?

A. I am quite sure it is once a week, but I can not say, as I do not pay much attention to those details. I feel sure that it is at least

once a week, and it may appear one day in one paper and another day in another paper. I am not sure as to that.

Q. That is, for instance, you in Lincoln patronize both papers and in Omaha both papers?

A. Yes, sir.

Q. Once a week in each one?

A. I should say I believe once a week.

Q. In each paper?

A. You mean in each of the three Omaha papers?

Q. You do in the Bee, the World, and the Herald in Omaha?

A. I think so; yes, sir.

Q. And you do in the two Lincoln papers?

A. I think so; yes.

Q. Now, I do not believe you have given me the figures for your purchases in Omaha from jobbers during 1918 and 1919.

Exam. BEEBE. I think he has given the percentages.

The WITNESS. Those percentages that I gave you covered that. That includes the flour shipments.

Q. (By Mr. TINLEY.) Let me get at that then, if you are going to stand on that position. What paper is it which you hold in your hand from which you have been testifying?

A. This is a condensed report given me by our office manager.

Q. Is your testimony as to figures you have used that paper, and your answers have been given in accordance with the figures on those papers?

A. Yes, sir.

Q. And I observed that on several occasions you called some one to help you answer a particular question. Now, who was that man?

A. Mr. King or Mr. Clumpner.

Q. Now, who is Mr. Clumpner?

A. He is our office manager.

86 Q. This answer then would be given on his explanation of what those figures mean?

A. Yes, sir.

Q. So that your testimony regarding these figures is simply giving what he told you or what he placed on that paper for you?

A. Yes, sir.

Q. Now, can you give me any figures—I don't care to have you tell me the companies from which you purchased, but the total amount of your purchases in Lincoln for 1918, from regular wholesale dealers there in the grocery business?

A. You mean the percentage?

Q. No; I mean the amount in dollars.

A. Well, about $90,000.

Q. In what year?

Mr. SMITH. I am informed that these figures in the Lincoln store are for one month.

The WITNESS. That is why I do not seem to understand this I guess. I did not talk with him about these before I came in here.

Mr. TINLEY. I understood that you were going to have these figures for me.

A. Well, he only had a very short time to get them.

Q. (By Mr. TINLEY.) Will you say it did not amount to $160,000 from one house in Lincoln for 1918, in round numbers? From one wholesale dealer in groceries in 1918, in Lincoln?

A. I couldn't say.

Q. And for 1919, $130,000?

A. These figures, I understand, are simply the average per month.

Exam. BEEBE. Why can't you call Mr. Clumpner if he can give that better?

Mr. REEVES. Yes; I think that would be better. Suppose that we let him be sworn now and go over these figures.

Mr. TINLEY. I think that is all at the present time.

(Witness excused.)

(Discussion off the record.)

Exam. BEEBE. May it be stipulated by counsel for the commission and counsel for the respondents that the Basket Company will prepare a statement of the net amount representing the purchase
87 price of the total of all goods in the grocery line purchased from the wholesale grocers in Omaha and Lincoln for the years 1918 and 1919, and that they also prepare a statement of the total cost price of the grocery items purchased from Granger Brothers in 1918, also in 1919; and that they also submit a statement of their total purchases for the years 1918 and 1919, and that these be submitted, upon preparation by the Basket Stores Company, to the commission and by this stipulation made a part of the record in this case, as a part of the testimony of Mr. Williams.

Mr. TINLEY. I want the statements submitted to me so that I may examine them and have the privilege of filing counter statements if I find that it is not correct.

Exam. BEEBE. Yes. Mr. Smith, will you have a duplicate copy made and submitted to Mr. Tinley?

Mr. SMITH. Yes. Now, the statement—in that do you care to have the sugar purchases?

Mr. TINLEY. Yes, I would like to have the sugar separately.

Mr. WILLIAMS. Who do you define as wholesalers?

Mr. TINLEY. Oh, the general wholesalers. There is no chance for dispute about that. Granger Brothers, Lau, Raymond Bros. of Lincoln, Paxton-Gallagher; H. J. Hughes in Omaha; Claude Rainey; Simon Brothers and Romewic & Shontke of Council Bluffs.

Exam. BEEBE. Have you any more witnesses, Mr. Reeves? Exhibit Number 3 has not been received in evidence as yet.

Mr. TINLEY. There is no objection to that.

Exam. BEEBE. It may be received, then.

(Commission's Exhibit No. 3 heretofore copied in the record, copy of which is forwarded herewith.)

Mr. REEVES. That is the commission's case, if the examiner please.

Exam. BEEBE. All right. The respondent may proceed.

Mr. TINLEY. I want to offer some samples of advertising of this company. The exhibits to be offered by the respondent comprise newspaper advertising, where they refer to the Basket Stores
88 Company, as the advertising of this Basket Stores Company referred to in this record, and authorized by it.

Exam. BEEBE. Let the record show that these are admitted by stipulation and received in evidence, the advertisements to be cut out of the newspapers, attached to the original transcript only, and be given numbers as respondent's exhibits, from 1 on, consecutively.

It is also stipulated by counsel for the commission and counsel for the respondent that commission's Exhibits Numbers 2 to 11, inclusive, may be copied and that the copies be substituted for the original, the originals to be returned to the T. A. Snider Preserve Company, 315 Hall Building, Kansas City, Missouri, to Mr. A. G. Davis.

(Newspaper clippings referred to were thereupon received in evidence, marked "Respondent's Exhibits Nos. 1 to 32," both inclusive, and are forwarded herewith.)

Mr. TINLEY. I will call Mr. William H. Raymond.

WILLIAM H. RAYMOND was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. TINLEY:

Q. Mr. Raymond, you live in Lincoln, Nebraska?

A. Yes, sir.

Q. What is your business?

A. Wholesale grocer.

Q. With what establishment are you connected?

A. Raymond Bros.-Clarke Company.

Q. What position do you hold in that company?

A. President.

Q. What is the line of business in which that company is engaged?

A. Wholesaling groceries.

Q. Now, what do you understand to be a wholesaler of groceries in that community?

A. A merchant who buy from manufacturers and disposes of the goods to retailers.

Q. Manufacturers and producers?

A. Yes. It might be producers.

Q. Now, in that business do you furnish warehousing facilities for carrying stocks of merchandise?

A. Yes, sir.

Q. What territory do you cover, just generally speaking?

A. Well, the whole State of Nebraska with the exception of about 30 or 40 miles from the Missouri River possibly.

Q. And any other States?

89 A. Parts of Colorado, Kansas, Wyoming, South Dakota, and Montana.

Q. You sell, I assume, through the medium of traveling salesmen, very largely?

A. Yes, sir.

Q. Who visit the different retail stores in your territory periodically and regularly?

A. Yes, sir.

Q. Do you keep in touch from year to year and month to month with the requirements of your trade throughout your territory, as to the different commodities of produce that will be necessary for their needs?

A. Why we try to very closely, considering our position as well as the trade conditions of that year, the crop prospects—try to figure what will be needed in the future.

Q. Do you also keep in touch with crop conditions, weather conditions and other matters affecting the prices or that will affect prices for the future, and also conditions that require the accumulation of stocks for future use?

A. We try to, yes, sir.

Q. For instance, I assume in canned goods sales, canned corn, tomatoes, and vegetables of all kinds, those are produced during the cropping season?

A. Yes, sir.

Q. And canned for marketing purposes?

A. Yes, sir.

Q. In buying, does the wholesaler, and do you, simply buy from month to month, or do you take into consideration the demands for your season?

A. Well, we aim to buy to supply the demand through the season.

Q. Is that generally true in preparing yourself to furnish service required by retailers through your territory, representing the general line of merchandise?

A. It is.

Q. What attention do you give to the carrying of stock in amounts in the house, so as to always be prepared to supply those needs from week to week?

A. Well, we have to figure on the way the merchandise is produced. The goods that are manufactured constantly through the year, we naturally do not buy in as large quantities or to run us as long a time as goods that are only produced once a year. In the way of canned fruits and vegetables that are produced once a year, we have to supply ourselves for the year's requirements. Articles like soap, syrup, sugar, and things of that sort that are being produced every day in the year, we aim to buy in carload lots.

Q. Those are purchased from month to month as you may need them?

A. Yes, sir.

90 Q. Is your territory pretty well supplied with railway facilities for delivering from your central point, which is Lincoln?

A. Yes, sir.

Q. What do you say about that territory also being served with telephone connections with the city of Lincoln?

A. Telephone and telegraph.

Q. As I understand it, your business as you get in in large quantities and ship out as a retailer may order?

A. Yes, sir.

Q. For the past few years, what do you say the business custom has been of retailers carrying large stocks of any particular line, or of each item, or just simply buying short from week to week, or thereabouts, keeping their stock up fresh?

A. Well, that usually depends a great deal on the individual retailer and his methods of doing business. There is no set policy amongst them. As a rule, during the fall of the year they buy or receive items like canned goods, cabbages, and things of that sort, enough to run them through the winter months, providing they have got capital to do it with.

Q. Now, you know the T. A. Snider Preserve Company. Is that the name of it?

A. I think so, yes.

Q. You have had business with that company?

A. Yes, sir.

Q. And handled its products from year to year?

A. Yes, sir, for many years.

Q. I want to call your attention to commission's Exhibit Number 2, which purports to be a shipping sheet of some kind, of the products of T. A. Snider Preserve Company, consigned to you. Do you remember of receiving that shipment?

A. Yes, sir.

Q. Now, that arrived some time in the fall of 1918?

A. Yes, sir.

Q. What was the labor situation in Lincoln at that time?

A. Well, as far as our house personally was concerned, we had about one-half enough force to carry on our business.

Q. Well, was that generally true with establishments of your kind?

A. Yes, sir.

Q. In your city at that time?

A. Yes, sir.

Q. That, I assume, was due to the war?

A. It was so true that at times the railroad companies, after they would get their own freight loaded, would send their gangs to the jobbing houses to help them unload the cars so as to relieve them for service.

91 Q. Was your difficulty in that regard rather acute in October and November, 1918?

A. Yes, sir; from July until January.

Q. I wish you would state what the fact is, whether or not in those two months the delay in unloading and warehousing goods was quite considerable.

A. Well, the delay was the worst that was ever known. The condition of the railroads, and the way the goods were brought in to us was something unprecedented. The Railroad Administration insisted on cars being loaded to capacity. They were loaded in all sorts of ways. There was hardly a shipment that came in that was in condition to be handled out again without a great deal of rehandling. There were carloads of goods shipped that would contain one shipment for Lincoln, another shipment for Kansas City or Hastings or Denver, and those cars would all have to be unloaded and reloaded with the proper goods going to the proper places, and it was a condition—I know the jobbers said they would never like to go through it again.

Q. Now, calling your attention to this specific shipment, I wish you would tell us as near as you can recollect the condition in which these goods came in.

A. Well, that car contained shipments for four or five different merchants. While I do not inspect these cars personally, unless my attention is called to them, my recollection of that car being called to my attention was that the goods had been loaded either at the factory or at some place in transit, and transferred or something, promiscuously, into the car. The shipments were all mixed up. A number of cases were broken which contained catsup, and that catsup was smeared around over the car floors and over the cases.

Q. What do you say about the containers in which they were received being broken open and the products spilled?

A. They were more or less.

Q. What work did that require of you, to place those commodities in condition?

A. Well, they have to be recoopered and handled.

Q. Had to be recoopered?

A. Yes.

Q. Was some of it in such condition that you turned it back to the railroad company?

A. I notice by a report there made out by the clerk that was in our employ at the time that that was the condition; but that was what happened.

92 Q. Now, on this list I notice items which seem to be specified for individuals and different concerns. Raymond Bros.-Clarke Company, some items; H. P. Lau Company, some other items. Who is H. P. Lau Company?

A. They are wholesalers in Lincoln.

Q. Groceries?

A. Groceries.

Q. Located in Lincoln, Nebraska?

A. Yes, sir.
Q. Are they dealers similar to yourselves?
A. Yes, sir.
Q. Are they engaged in the retail business at all?
A. Not that I know of.
Q. Do they operate any retail stores that you know of?
A. No, sir.
Q. Granger Brothers Company, do you know whether they are engaged in operating any retail stores or not?
A. No, they are not; not to my personal knowledge.
Q. They hold themselves out as wholesalers?
A. As wholesalers.
Q. Then there is the Basket Stores Company, that is the company that has been referred to this morning and early this afternoon?
A. Yes, sir.
Q. And there is the Bradley-Hughie Company. What is that concern?
A. That is a wholesale grocery concern down at Nebraska City.
Q. And the Blue Valley Mercantile Company? What is that?
A. That is a wholesale grocery concern in Beatrice.
Q. Are all of these, except the Basket Stores Company, engaged in the general wholesale of groceries?
A. Yes, sir.
Q. Now, all of these items appearing opposite the names of the parties to whom I have called your attention, on commission's Exhibit No. 2, were contained in that single car?
A. Yes, sir.
Q. When was that received, what, if anything, was done by your house, after the goods were ready for distribution, with reference to distributing them?
A. Well, the goods that were to be shipped out of town we hauled to the station.
Q. And those that were in town, what did you do?
A. Those that were in town, we notified them to come and get them.
Q. In what manner was that notification?
A. Why, when the shipping clerk was ready to deliver the goods, he phoned their shipping clerk.
93 Q. Was there any purpose on the part of your house to in any manner discriminate between any of these parties in Lincoln, Lau or Granger or the Basket Stores Company, as to the distribution of these commodities?
A. No, sir.
Q. Did you in any manner intend, or make any effort, to discriminate against the Basket Stores Company?
A. No, sir.
Q. Or hold up delivery to them?
A. No, sir.
Q. Or delay it in any manner whatsoever?

A. Not to my knowledge.

Q. No such order as that from the house?

A. No, sir.

Q. You did not handle the goods themselves?

A. No, not personally.

Q. Is the shipping clerk who had charge of that in your employ now?

A. I can't say as to that; we changed shipping clerks just about that time. We had one shipping clerk who, on account of the condition of things, practically went crazy, and we had to change.

Q. Now, what was your understanding at that time as to the business that the Basket Stores Company was engaged in?

A. Retail business.

Q. Do you know whether or not they maintained any stores where they were making sales at retail?

A. I don't quite understand you.

(Question read as above recorded.)

A. Yes. All of their stores were maintained that way.

Q. Do you known about how many stores they had in the city of Lincoln?

A. I think in Lincoln and the suburbs of Lincoln about seventeen stores.

Q. Do you know the location of those stores in a general way?

A. Why, I know where they are located. I could find them.

Q. Then you know in a general way?

A. Oh, yes. They are scattered all over town.

Q. Now, have you customers in Lincoln—retail customers?

A. Yes.

Q. Customers running retail stores?

A. Yes, sir.

Q. To whom you supply groceries continuously?

94 A. Yes, sir.

Q. Do you know what the f t is as to whether or not the stores of the Basket Stores Company a in direct competition with those stores

A. They are.

Mr. REEVES. If you honor please, I think that is calling for a conclusion.

Exam. BEEBE. Well, the answer may stand.

Q. (By Mr. TINLEY.) In what manner does the Basket Stores Company, or to what people does the Basket Stores Company sell its products that it carriers in its store?

A. To consumers.

Q. To whom do other retailers, your customers, sell their products?

A. To the consumers.

Q. I wish you would state what the fact is as to whether or not you charge anything above the actual amount you paid the producers

or manufacturers for commodities that you are selling to the retail stores in Lincoln.

A. I don't understand that.

(Question read as above recorded.)

A. Why, sure. We charge the addition of freight; the addition of cost of handling the merchandise, and our profit.

Q. That is, you figure every item that enters into the actual cost, and then a profit for the service you render?

A. Yes, sir.

Q. What is the fact as to whether or not, in the conduct of your business with retailers, you sell to all on the same terms, taking into consideration the quantity purchased and all the conditions that affect the cost?

A. That is the policy that we aim to carry out. There may be isolated instances where it is not done, from some local cause.

Q. But that is the general policy?

A. That is the general policy. We have our cost book sheets in plain English, and it is simply a sale price. There is no cost price. None of our traveling men have the cost of the goods. It is all the selling price. That is all the price they know.

Q. What, if you know, is the effect upon commodities sold by you to your customers, if competitors of theirs have in their stock like commodities—identical—acquired at an appreciably less cost?

95 Mr. REEVES. If your honor please, that question, I think, is getting into the realm of speculation.

Exam. BEEBE. Read the question, please.

(Question read as above recorded.)

Exam BEEBE. He may answer. The objection will be noted.

A. Well, it is a well known condition of trade that if one man gets goods cheaper than another, he can undersell him.

Q. (By Mr. TINLEY). Now, you purchased an amount of the Snider Company's products delivered to you in October and November, 1918?

A. Yes, sir.

Q. State what the fact is as to whether or not you have been able to sell the amount of your purchase, or whether you still have on hand a considerable quantity of those goods.

A. We have been able to sell but a very small percentage of the catsup and some of the other items.

Q. Do you know whether or not the Basket Stores Company were advertising these very commodities for less than you could sell them, plus a reasonable margin of profit for yourself, and a reasonable profit for the retailer?

A. No. I am not posted on the prices as a rule that the retailers advertise for their goods.

Q. Well, you know what they cost you?

A. I could not tell without referring to the invoice.

Q. Without going into it?

A. No.

Q. Now, did you say to the Snider Preserve Company's representative that the Basket Stores Company was in fact a company engaged in the retail grocery business?

A. I expect I did.

Q. And did you believe that that was true?

A. I did.

Q. From what information did you come to that conclusion or opinion?

A. Why, simply the fact that they had stores in Lincoln, selling to the consuming trade.

Q. Had you any knowledge of their making sales to wholesalers or to retailers?

A. I never had heard of any.

Q. Now, this morning reference was made to selling hotels and restaurants—large hotels and restaurants. I wish you would state what the fact is as to whether or not, in this section, those concerns are regarded as concerns engaged in the business of reselling produce.

96 A. I think in this section it is generally regarded that way. Hotels are placed on the same basis as a retailer. A retailer buys goods from a jobber and resells to a consumer. A hotel buys goods from a jobber and resells to a consumer, plus his cost of preparation and profit.

Q. Will the large hotels and restaurants resales to consumers average up pretty well with the sales of retail stores?

A. Some of them; some of them larger than some of the retail stores.

Q. Now, did you tell the representative of the Snider Preserve Company that you could not buy from him if he sold to the retail trade?

A. My recollection is that I told him that I would not buy from him.

Q. Now, did you state to him any reasons why you could not do so, or would not do so?

A. Not to my recollection.

Q. Could you engage in the business of a wholesaler, or distributor of commodities in the way wholesalers usually do, if the producer of these commodities was selling to retailers who were competing with your customers?

A. Why, no, we could not handle the goods for nothing, and stay in business.

Q. It would simply drive you out of that market on that commodity?

A. Yes, sir.

Q. What do you say, as a matter of fact, as to whether or not you could operate your business at all and handle commodities of a producer who was selling to retailers at substantially the same price that they were selling to you?

A. If that was the general practice—in other words, if all producers or manufacturers sold direct to the retail trade, the wholesaler could not stay in business.

Q. I assume that there are commodities where the producer goes direct to the consumer throughout the country?

A. On those commodities I do not believe you will find many wholesalers, unless they are producers and wholesalers combined.

Q. As a matter of fact, as to those commodities, the wholesaler is out of business?

A. Yes, sir.

Q. That would be the case with the Snider Preserve Company product?

A. Yes, sir.

Q. Did the Snider Preserve Company man make any contention at any time that the Basket Stores Company was engaged as a wholesale grocer?

97 A. My recollection is that he said that they had a wholesaler's license from the Government; and that on that account the Snider Preserve Company were compelled to sell them.

Q. Did he say whether that was just a license issued under the food conservation act?

A. He did not say what it was. He said a wholesaler's license.

Q. Do you know of any other license that a wholesaler has, in the State of Nebraska?

A. No, sir; except to sell tobacco and cigarettes.

Q. Well, that is a tax.

A. That is a tax.

Q. Now, are you familiar with the practice in Nebraska, particularly in Lincoln, of wholesalers and jobbers receiving consignments that may be called a pool car, and then that particular jobber distributing those to others in a like class?

A. Yes, sir.

Q. What do you say the general practice is as to charging for such service?

A. Unless there is a specific agreement made not to charge, the general practice at the present time is to charge 1½ cents per hundred pounds.

Q. For the service?

A. For the checking out, and if there is drayage or other charges involved, why they are extra.

Q. Are you familiar with the practice of receiving shipments where the producer sells to retailers and ships through the wholesaler, as to what charge he is allowed, and generally receives?

A. Well, the only condition of that kind that I know of is like Mr. Davis explained this morning, where, for instance, a jobber will buy a carload of goods. A manufacturer who is anxious to get these goods before the public will send his agents around to the retailers and take orders. Sometimes in five, ten, fifteen, or twenty case lots.

They very often have quantity prices. These orders are then sent in to the jobber and the jobber is allowed his regular percentage of profit, and the shipment is delivered by the jobber to the retailer upon the arrival of the car.

Q. Those sales are made to the retailer at the reselling price of the jobber?

A. Yes, sir.

Q. And the goods are charged to the jobber at the wholesale price?

A. At the wholesale price.

Q. So that is his margin of profit then?

A. That is his margin of profit. There are a large number of concerns that are doing that all the time.

98 Q. Now, were you familiar at the time you ordered these goods, from the Snider Preserve Company, as to its declared policy of doing business, of selling to wholesalers or selling to retailers, or not selling to retailers?

A. Well, as far as we knew, they were confining their sales to jobbers.

Q. That was your general understanding?

A. That was my general understanding.

Q. Did Mr. Davis say anything to you at any time about their changing that established policy of business?

A. No, sir.

Q. Did you have any contract with him with reference to charging for the service that you rendered, or the amount you should charge?

A. No, sir.

Q. Did you have any contract with him or with the Snider Preserve Company that you were to charge nothing, or to charge any particular amount, for the service you rendered?

A. No, sir. In fact, we did not even know that the car was going to be shipped to us until we got the invoice for it.

Q. When that car came in with this one item to the Basket Stores Company, did you treat that as though it had been a shipment to a retailer or a wholesaler of that item?

A. Well, I immediately wrote the Snider Preserve Company.

Q. I am just asking you whether you treated it as an item to a retailer or to a consumer, or recognized it as an item to a wholesaler?

A. We recognized it as an item to a wholesaler, as far as our handling it went.

Q. Did you recognize the Basket Stores Company as a wholesaler or retailer?

A. We did not enter into any recognition of any kind with the Basket Stores Company at all.

Q. Did you have anything to do with it one way or the other?

A. Not at all.

Q. Did you treat it in any different manner than you did any other part of that shipment?

A. Not in the least.

Q. Now, about what was the total amount of that invoice to the Basket Stores Company?

A. I couldn't say. I have never seen it except as it was produced here.

Q. Well, you have knowledge of the amount of goods that were included in it, don't you?

A. I think it was something around $1,800.

Q. Basing that upon the charges to yourself?

99 A. Yes, sir; the recognized price of Snider's goods to the jobber.

Q. Now, your charge to the Snider Company for the services to that concern was $100?

A. Yes, sir.

Q. Now, what do you say as to whether or not the percentage of the total bill was any more than your average cost of doing business, in buying wholesale and selling to retail dealers?

A. I don't understand the question.

(Question read as above recorded.)

A. You mean my percentage of charge to the Snider Company?

Q. Yes; for that one item.

A. No; it was not.

Q. Was it equal to the amount——

A. Not for the year 1918.

Q. Did you take into consideration the fact that it was a large sale, and reduce the amount of your charge and bill below the average cost of going business?

A. I did, for the fact that it had been the Snider Company's practice to sell to the retailer through the jobber consignments of these goods for fall delivery, and give the retailers the advantage of purchasing at a price lower than the retailer of small lots. And the fact that the goods were not put in stock and carried.

Q. You take those things into consideration in reducing the amount of your charge?

A. Yes, sir.

Q. And the amount you charged there is approximately six per cent?

A. Somewhere between five and six per cent.

Q. About what is the average cost of doing business during the year of 1919?

A. Between eight and ten per cent.

Q. Now, did you apprise the Snider Preserve Company of the amount that you proposed to charge them for that service, with promptness?

A. No. I wrote them immediately upon receipt of their shipping papers, asking them what commission they would allow me on the sale; what charge they would give me. That communication was unanswered by the Snider people.

Q. Did you ever get an answer to that?

A. No, sir.

Q. I call your attention to commission's Exhibit Number 4, and ask you to state what the fact is as to whether or not you have ever received an answer to that letter.

A. Not to this specific letter; no, sir.

Q. Now, calling your attention to commission's Exhibit Number 5, I will ask you if you received any answer to that letter.

A. No.

100 Q. Until after Mr. Davis came to see you?

A. Not to my knowledge have any of those letters been answered.

Q. Was Exhibit Number 4 answered in any way whatsoever up until after you had written Exhibit Number 5?

A. No, sir.

Q. Was there any answer given to you by the Snider Preserve Company with reference to your claim for commission, or request that you be allowed a commission for handling that stuff?

A. Not until after I had paid it and deducted it.

Q. Not until after you had made your deduction?

A. No, sir.

Q. Was there any statement made by them from the time that you first wrote them on October 8th up until after you made the deduction as to what they would allow you or whether you would be allowed anything, or whether they objected to your being paid anything?

A. There was no statement of that kind made. The only communication I received from them was a request to pay the bill as they had noticed it was past due.

Q. Now, since then you have received from them a credit memorandum authorizing you to take credit for any amount?

A. Yes, sir.

Q. From what amount?

A. My recollection is it is something like $290 and some odd cents.

Q. Have they remitted to you for that at all?

A. No, sir. We have had that credit memorandum since last spring some time.

Q. Now, some testimony has been offered that you have not purchased any Snider's product since this delivery in the fall of 1918. Do you know what the fact is as to whether or not you still have on hand some of that shipment?

A. I know that we have a large part of that shipment on hand. Other items we are out of, but, as far as I know, our trade has never been solicited by the Snider Preserve Company since that time.

Q. Have they ever called upon you or solicited your trade or asked for any orders from you, or in any manner presented their products to you so that you had an opportunity to buy or refuse to buy?

A. I do not think that there has been a salesman of theirs come to our office since Mr. Davis' visit in January. We may have received

circulars quoting prices, as their opening prices for 1919. I
101 can not state as to that, but beyond that fact, I do not think that personally I have been solicited for any orders.

Q. Now, there was some testimony this morning to the effect that Mr. Davis said that if you did not pay it he would report you to the Federal Trade Commission. Do you remember just how that statement came up?

A. As near as I can remember the statement was as he made it. Of course, Mr. Davis is a salesman and has been calling on us more or less, and we as jobbers or buyers—there are a good many different kinds of conversation between salesmen and buyers.

Q. Oh, I apprehend there are.

A. As far as I know, this conversation was along the same line.

Q. He was after the $100 item?

A. He was after the $100.

Q. And you wanted compensation for handling that goods?

A. I certainly did.

Q. You were insisting upon your business policy?

A. Yes, sir.

Q. There seems to have been a little bit of ill feeling developed there somehow or other?

A. No; I don't think there is any ill feeling. I am not in the habit of getting mad at people. I just tell them what I think.

Q. He was not mad either, I guess?

A. I don't think so.

Q. The upshot of it was that he told you he was going to report you to the Federal Trade Commission?

A. Yes, sir; and, as far as I know, I told him to go ahead.

Q. He said that you said something about if he could stand the advertising you could. What advertising did you have in mind that would be of any value to you?

A. Well, it is a known fact that if retailers know that a manufacturer is selling his goods direct to a certain retailer, and will not sell him direct, he will not buy his goods. If Mr. Davis came out publicly against us on this proposition, he would have to make it public that the Snider Preserve Company had sold their goods direct to the Basket Stores.

Q. That is, to retailers in competition with other retailers?

A. Yes, sir. And the fact that I was objecting to that practice, I thought might do me a good deal of good amongst the other
102 retailers if he made that statement public. That is the kind of publicity I had in mind both for the T. A. Snider Preserve Company and the Raymond Bros.-Clarke Company.

Q. That was not talked of between you?

A. No. That is my explanation.

Q. But all that passed between were the remarks that were made as quoted by Mr. Davis?

A. Yes, sir.

Q. Now, what is the fact as to whether or not you have been insisting from the beginning that you were entitled to compensation for that service?

A. Well, I have still got the compensation.

Q. As to whether or not you are insisting that you were in fact entitled to it?

A. Well, I certainly have insisted, and there has been nothing said or no correspondence of any kind regarding it for a year—from the time of Mr. Davis's visit to Lincoln. They have made no further demand and I have made no further refusal to pay it.

Mr. TINLEY. I think you may cross-examine.

Cross-examination by Mr. REEVES:

Q. You made a statement, Mr. Raymond, as I remember, to the effect that in checking out this pool car you did not treat the goods consigned to the other consignees differently from the treatment that you gave the consignment to the Basket Stores Company?

A. Yes, sir.

Q. Is that what you said?

A. Yes, sir.

Q. Well, what did you mean by that? Do you mean to say that you claim also a commission from the Snider Company upon the consignment to the Granger Brothers store, for instance?

A. No; I meant in the handling of the goods, the handling of the shipment, that when the car was unloaded—that comes with the various marks on—in the different piles, and when the goods were ready to deliver we called up the jobbers and told them to come and get them.

Q. Why didn't you call up the Basket Stores?

A. As far as my personal knowledge goes, they did.

Q. To refresh your recollection, I will show you a letter that you wrote to the Bradley-Hughie Company. That is one of the firms who got goods in that car, wasn't it?

A. Yes, sir.

Q. Does that call to your mind the matter of the date that you shipped the goods to the Bradley-Hughie Company?

A. As far as I know, their order was shipped that day.

Q. What date does that letter bear?

103 A. October 16th.

Q. What year?

A. 1918.

Q. I will show you what purports to be a freight bill for the same shipment, and ask you if it is in fact?

A. As far as I know it is.

Q. What date does it bear?

A. October 16th.

A. October 16th.

Q. I believe you testified that some of these goods were received in bad order; broken catsup, spilled over the car and over the crates and the cases?

A. Yes, sir.

Q. Some of these cases were turned over to the North Western Railroad Company, I believe you said?

A. I think on this specific shipment they were.

Q. If this the receipt for those bad-order cases?

A. Yes; I suppose so. There is no regular signature on it. It is one of our drayage tickets.

Q. There is an initial "G." Who might that represent?

A. That might be the person that received it down at the freight station.

Q. What date does that transaction bear?

A. That is October 15th.

Q. Now, how do you account for the fact that part of this car was turned back to the railroad company as being received in bad order on October 15th; another batch of it was shipped to the Bradley-Hughie Company at Nebraska City, Nebraska, on October 16th, and you did not until the following November 16th call the Basket Stores Company on the telephone and notify them that their goods were there? How do you account for that delay of thirty days?

A. Well, I really cannot account for it at the present time without seeing somebody, and I don't know as he could tell. That was our shipping clerk that was working at that time. My instructions were when a car was shipped to us, that is, when the car was received, I took out the delivery ticket to him, to the shipping clerk, and told him when the goods were in condition to ship, to be delivered to the various parties, to do so. I remember two or three weeks after that of going out into the warehouse and seeing this great big pile of goods. I asked the shipping clerk why the Basket Stores had not got them. Now my recollection is that he said at that time that he had called up the Basket Stores Company and that they had never come for the goods. At that time I instructed him to call them again, because they were in our way. They were piled right on our shipping floor and we were just as anxious to get rid of them as anybody could be.

But I cannot swear to that condition. It is just a recollec-
104 tion that I have amongst some other hazy recollections of the year 1918 in the fall, in a business day.

Q. In your letter of October 8, which is commission's Exhibit Number 4, you make this statement:

"We ask that you kindly send us credit slip for the regular jobber's profit on this order, and oblige." What would have been the amount of the regular jobber's profit on that order, assuming it was $1,668.00?

A. Well, you mean based on the profit that Snider had showed us on other sales?

Q. Whatever you refer to there as "the regular jobber's profit."

A. Well, the Snider Preserve Company have had—my recollection is that they have had a certain retail selling price on which they allow jobbers a percentage of profit.

Q. What is that?

A. That is—I don't know what it is now. It has varied at different times. My recollection is that at that time it was ten per cent.

Q. Has it, part of this time, been as much as fifteen per cent?

A. I think it has. I would say also that I think it varies on the various lines of products. I do not think it is uniform.

Q. Assuming it was a minimum of ten per cent, that would have made $166, wouldn't it?

A. Yes, sir.

Q. What was the motive which prompted you to compromise that claim for $100?

A. Well, I had held up the remittance for some length of time, trying to get an answer from them on my various letters, and at the time I remitted that I took the cash discount, which I really was not entitled to, under the terms of the remittance.

Q. Well, you just sort of split the difference with them in the matter of the $100 charge?

A. In a way; yes.

Q. Who are your leading competitors at Lincoln in the wholesale grocery business?

A. H. P. Lau and Granger Brothers.

Q. Do they do a larger volume of business than your firm or practically the same?

A. I think Granger Brothers do a larger business than we do, and I think Lau are about the same. It is pretty hard to tell about Granger Brothers, because they are mixed up with a fruit house, and it is hard to tell.

Q. What volume of business does your firm do in a calendar year?

105 A. Well, my figures are not quite complete for this past year, but about two and a half millions.

Q. That is about the average business for the wholesale grocer in this territory, do you think?

A. Oh, no. There is no average to them. Some of them do six or seven million dollars and some don't do a million. It depends on their location and their territory. The Omaha wholesale grocers do a larger volume of business than the Lincoln wholesale grocers, and the Lincoln wholesale grocers do a larger volume of business than those in Nebraska City, Beatrice, Fairbury, and so forth, so that you cannot get at any average.

Q. About this charge which you made of $100, did you intend to keep all of that yourself, or did you expect to divide that with Granger Brothers and the other consignees in that car?

A. I had no intention of dividing it with anybody.

Q. You expected to appropriate all of that to your own use?

A. Yes, sir.

Q. And did not divide it with the other consignees?

A. No, sir. In fact, the other consignees did not know anything about it.

Q. Is the Raymond Bros.-Clarke Company or yourself individually interested in retail stores in any capacity?

A. No, sir.

Q. You have no retail business at all?

A. Absolutely none.

Q. I think counsel probably suggested that all wholesalers to some extent sell to members of the family, relatives, and employes. I presume your firm indulges in that to some extent?

A. Oh, that is customary.

Q. Does that amount to a considerable volume of business in the course of a year?

A. No. It is the only way of keeping down the high cost of living personally. I don't know. I don't suppose it would amount to a thousand dollars a year.

Q. What about the number of retail stores in Lincoln? Have the number increased or decreased in the last two years?

A. The number has increased because the population of the town has increased.

Q. Did the advent of the Basket Stores Company have a tendency to lessen the number of other retail stores in Lincoln?

A. Well, I should say that it had.

Q. Hasn't there been a new chain go in there?

A. In fact, I know of a great many merchants that sold out to them and did not go back into business.

106 Q. Isn't it a fact that a new chain store has entered business in Lincoln recently?

A. Well, I don't know as you would hardly call them a chain store. I think they have got ambitions to be a chain store, but I don't think they have gotten that far yet.

Q. Is there a firm or organization known as the Liberty Chain Stores?

A. That is the one I had reference to. I think they have got about three stores in Lincoln, or possibly four. I think they have two or three outside.

Q. That is practically a new venture, isn't it?

A. Practically a new venture and is not very successful.

Q. Does your firm sell supplies direct to restaurants and hotels?

A. Yes, sir.

Q. What sort of terms do you make to hotels and restaurants as compared with the terms and prices made to retail stores, for instance?

A. The same terms and prices in the same quantities.

Q. Do you have occasion to sell in extremely large quantities to any of your customers, any unusually large quantities?

A. Well, I wouldn't say unusually large quantities.

Q. What I am driving at is in case you have a customer that orders goods in larger quantities than usual, do you make a special price to a customer like that?

A. We have got retailers that buy canned goods and such things in carload lots.

Q. You do make a special price, then, to a quantity purchaser? I mean a purchaser of a large quantity?

A. We naturally give him the best price we can. We can afford to handle a carload on a less percentage of profit than a smaller shipment.

Q. Now, there was some testimony to the effect that you made a statement as to how you would take this matter to the attention of the Iowa-Nebraska Wholesale Grocers Association. Did you, in fact, call that matter to the attention of the association?

A. Not until the time we received notice that there had been a complaint filed against us, and I came up and saw our secretary and Mr. Tinley, our counsel, as it was something I had no experience in, and I knew that they had had considerable experience with the Federal Trade Commission, and I wanted their advice on the subject That was the only reference that has ever been made.

Q. After the complaint was made in this case, and was issued
107 and served on you, you did in fact call the attention of the matter to the Iowa and Nebraska Wholesale Grocers Association?

A. No, sir.

Q. What did you do?

A. I came up and interviewed our secretary, Mr. Melhop, and our counsel, Mr. Tinley.

Q. Your firm, I take it, as a member of that association, the Iowa-Nebraska Wholesale Grocers Association?

A. Yes, sir.

Q. Did you conclude that this was an association matter and on that account go to the secretary with it?

A. I considered that the principle involved in this matter was even a national matter as far as the wholesale grocers are concerned. I would not have hesitated to take it up to the national association.

Q. And on that account you consulted the secretary of the association?

A. Yes, sir.

Q. And followed his instructons?

A. Yes, sir. I considered it a principle that all wholesalers, whether grocery men, dry goods, or any other line of business, are interested in. It is vital to their business.

Q. That association is, then, practically making your defense in this proceeding? Isn't it?

A. No, sir.

Mr. TINLEY. That is objected to as incompetent, irrelevant, and immaterial.

Mr. REEVES. I will withdraw the question. I think that is all.

Redirect examination by Mr. TINLEY:

Q. Just a few questions. When these goods were received in the house, do you know what was done with reference to the making out of delivery tickets for the different shipments?

A. No. Just the regular course of business was followed.

Q. It just went into the hopper as anything else?

A. Yes, sir.

Q. Did your house have any purpose or intention to discriminate in any manner whatsoever against any one of the parties interested in that carload shipment?

A. No, sir.

Q. Now did you have any purpose in keeping the stuff in your house?

A. No. We would have been very glad to get rid of it.

Q. It was simply in the way?

A. Simply in the way, absolutely. We were sending goods to storage warehouses and everything to unload cars. We had no use
108 for these goods on our platform. We had no room for them.

Q. You wanted the additional space?

A. Yes, sir.

Q. Now, have you any matter of interest, as you understood it, in this controversy, excepting the question of whether you would have $100 pay for this work? Any matter of interest other than that which every other wholesale grocer in America has?

A. Yes, sir.

Q. Is that principle which you refer to that you believe is involved the question of whether you could refuse to buy from any man that you sit for any reason that you see fit, or for no reason at all?

Mr. TINLEY. I think that is all.

Mr. REEVES. That is all.

(Witness excused.)

Mr. TINLEY. There is a statute that I want to offer. I haven't it with me, but it refers to the obligation to sell, by all dealers, any merchandise at the same price, under identical circumstances and conditions.

Mr REEVES. The Nebraska antitrust law?

Mr. TINLEY. Yes.

Mr. REEVES. We will stipulate that you may supply that.

Exam. BEEBE. Let the record show that it is stipulated by and between counsel for the commission and counsel for the respondent that that certain statute of the State of Nebraska, in regard to prices at which dealers may sell, may be offered in evidence at a later date by counsel for the respondent, and that this may be received in evidence and considered as a part of the record in this case.

Mr. TINLEY. I don't think there is anything else.

Mr. REEVES. I have nothing in rebuttal. It is customary to fix the time now, to file briefs.

Exam. BEEBE. Yes. How much time will you want for your brief. Mr Reeves?

Mr. REEVES. Thirty days from to-day.

Exam. BEEBE. Very well. I will fix the time, thirty days from to-day for counsel for the commission to file his brief. Thirty
109 days thereafter for counsel for the respondent to file brief.

The hearing closed.

(Whereupon, at 4.45 p. m., January 13, 1920, the hearing of the above entitled matter was closed.

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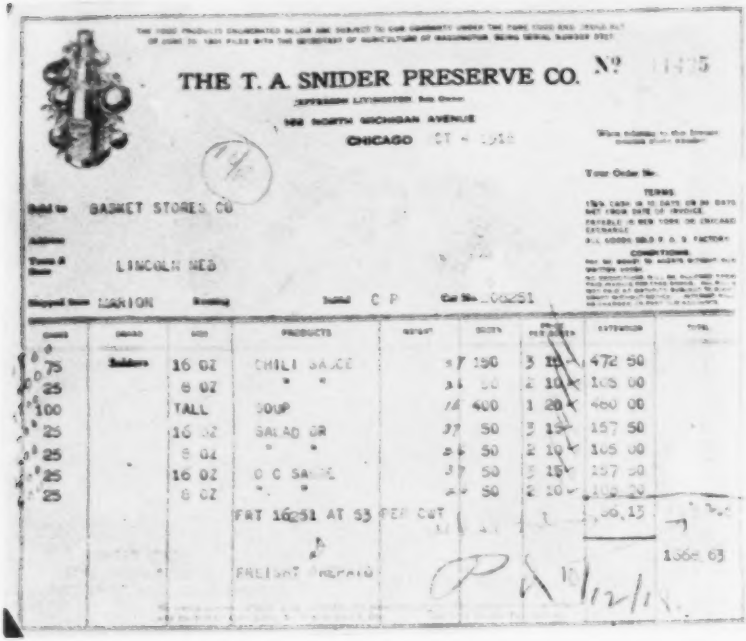
109 *Commission's Exhibit 1.*



THE T. A. SNIDER PRESERVE CO. No 1435

108 NORTH MICHIGAN AVENUE

CHICAGO

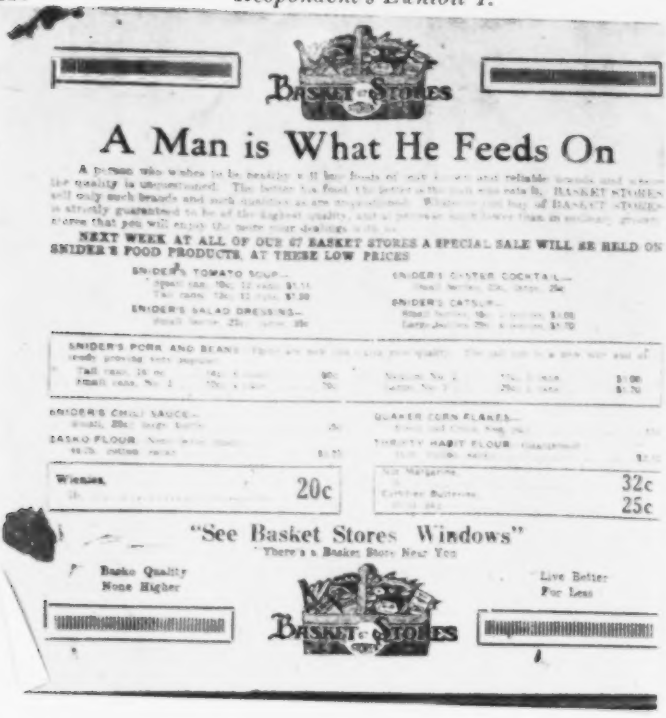
Sold to BASKET STORES CO

LINCOLN NEB

MARION

QUAN.	UNIT	DESCRIPTION	PRICE PER DOZEN	EXTENSION
75	16 OZ	CHILI SAUCE	3 15	472 50
25	8 OZ	" "	2 10	105 00
100	TALL	SOUP	1 20	460 00
25	16 OZ	SALAD DR	3 15	157 50
25	8 OZ	" "	2 10	105 00
25	16 OZ	O C SAUCE	3 15	157 50
25	8 OZ	" "	2 10	105 00
		FRT 16251 AT 83 PER CWT		1,362.50
		FREIGHT PREPAID		136.63

110 *Respondent's Exhibit 1.*



BASKET STORES

A Man is What He Feeds On

A person who wishes to be healthy will buy foods of pure and reliable brands and whose quality is unquestioned. The better he feed the better he feels and eats it. BASKET STORES sell only such brands and such qualities as are unquestioned. Whatever you buy of BASKET STORES is strictly guaranteed to be of the highest quality, and at prices not lower than an ordinary grocer charges that you will enjoy the taste your dealings with us.

NEXT WEEK AT ALL OF OUR 67 BASKET STORES A SPECIAL SALE WILL BE HELD ON SNIDER'S FOOD PRODUCTS, AT THESE LOW PRICES

SNIDER'S TOMATO SOUP—

SNIDER'S OYSTER COCKTAIL—

SNIDER'S SALAD DRESSING—

SNIDER'S CATSUP—

SNIDER'S PORK AND BEANS

SNIDER'S CHILI SAUCE—

QUAKER CORN FLAKES—

BASKO FLOUR

THRIFTY HABIT FLOUR

Wieners 20c

32c

25c

"See Basket Stores Windows"

There's a Basket Store Near You

Basko Quality
None Higher

Live Better
For Less

BASKET STORES

111 *Respondent's Exhibit 2.*

The Power of Cash

BASKET STORES have found it—the Philosopher's stone that turns everything to gold—it's Pay as You Go! Cash commands the biggest bargain. It always gets the richest value. Every day you see proof of this. BASKET STORES have recognized its power, and stand for "cash" in both buying and selling.

BASKET STORES buy groceries in enormous volume—for sixty-seven BASKET STORES—for cash—and sell to more than thirty thousand regular customers daily—for cash. This vast buying and distributing power, on a cash basis, secures us every possible concession from the producer, and permits us, in turn, to pass on these savings to our customers.

Buying for cash, selling for cash—energy, truth, enterprise and modern methods, coupled with selling only the highest qualities groceries at the lowest prices—are the living principles responsible for the marvelous growth of BASKET STORES and enables us to save our customers nearly 20 per cent on more than 300 average items.

"LIVE BETTER FOR LESS"

None Higher Than Basket Quality.

There's a Basket Store Near You.

112

Respondent's Exhibit 3.

The Third Car of Ocean Fish Has Arrived

Fish Is The Best Meat

Why This Price Is Possible

PAY NO MORE THAN THESE PRICES

Steak Pollock or Boston Blue Fish	10c per lb.
Steak Cod	10c per lb.
Whiting or Silver Hake	10c per lb.
Market Cod	10c per lb.
Native Mackerel	20c per lb.

Endorsed by the U. S. Gov't.

Live Better For Less

BASKET STORES

There's A Basket Store Near You

113 *Respondent's Exhibit 4.*

67 Basket Stores 67

WHAT DO YOU EAT FOR BREAKFAST?

[illegible]

[illegible]	[illegible]
POTATOES, GOOD QUALITY, AS LONG AS ONE CAR-LOAD LASTS, PER BUSHEL [illegible]	ALL BASKET STORES [illegible] CARRY A GOOD VARIETY OF FRESH GREEN VEGETABLES AND FRUIT LOWEST [illegible]

SPECIALS IN BASKET STORES' MEAT DEPARTMENT.

[illegible]

[illegible]	[illegible]

STRICTLY FRESH EGGS—EVERY EGG GUARANTEED, Per Dozen 44c

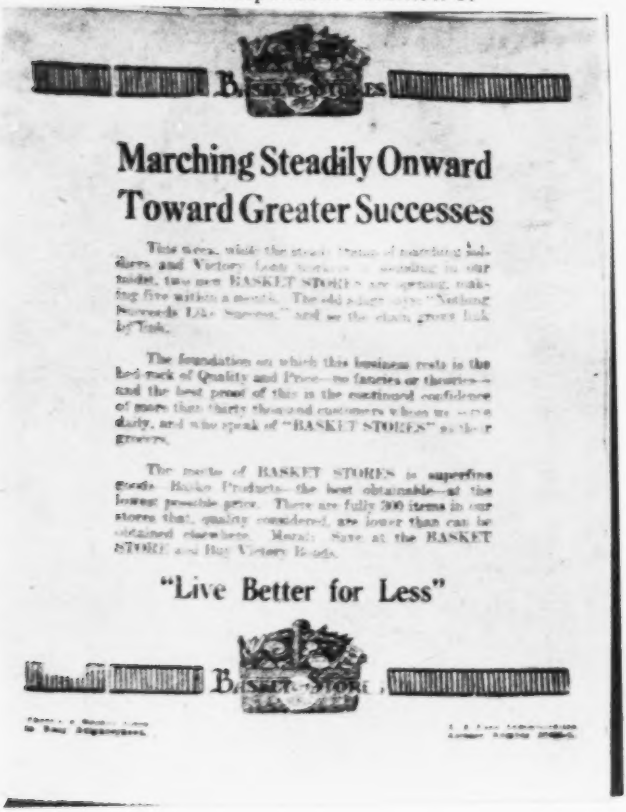
[illegible]

[illegible]

67 Basket Stores 67

[illegible]

114 *Respondent's Exhibit 5.*



Marching Steadily Onward Toward Greater Successes

This week, while the steady [illegible] of marching soldiers and Victory [illegible] resounding in our midst, two new BASKET STORES are opening, making five within a month. The old adage says "Nothing Succeeds Like Success," and we the claim proves true by fact.

The foundation on which this business rests is the hard rock of Quality and Price—no fancies or theories—and the best proof of this is the continued confidence of more than thirty thousand customers whom we serve daily, and who speak of "BASKET STORES" as their grocers.

The motto of BASKET STORES is superfine goods. Basket Products—the best obtainable—at the lowest possible price. There are fully 300 items in our stores that, quality considered, are lower than can be obtained elsewhere. Moral: Save at the BASKET STORE and Buy Victory Bonds.

"Live Better for Less"

115 *Respondent's Exhibit 6.*

Next Week Is "Summer Beverage Week"

At All Basket Stores

When women entertain at cards or in the home, there's some sort of a beverage required—and it ought to be a good beverage for the sake of one's personal satisfaction. FRUIT NECTAR, for Punch Bowl Drinks, Sherbets, Frappe, Sauces and Ice Cream Dressings, is something that is distinctly good, and is instantly prepared with the addition of sugar and water.

Another ideal home drink is ROOT BEER, made from HIRE'S HOUSEHOLD EXTRACT. ARMOUR'S VERIBEST GRAPE JUICE, ready to serve, is a delightful and healthful drink.

FRUIT NECTAR
12 Fruit Flavors, makes 14 pints, 35c bottle
For 23c

HIRE'S ROOT BEER EXTRACT
25c bottle 21c

ARMOUR'S VERIBEST GRAPE JUICE
Pint bottles, 35c; quart 68c

LOJU—4-oz. 9c; 3 for 25c
16-oz. 23c
32-oz. 44c

APPLJU—6-oz. 09c
14½-oz. 19c

PIKEL— 13c

FRESH EGGS—
Per Dozen 35c

WEINERS—
Per Pound 20c

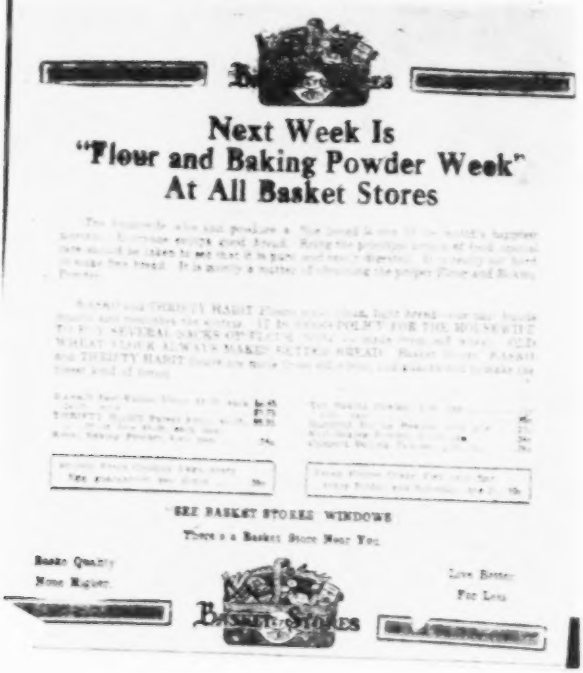
"See Basket Stores' Windows"

There's a Basket Store Near You

Basko Quality
None Higher

Live Better
for Less

116 *Respondent's Exhibit 7.*

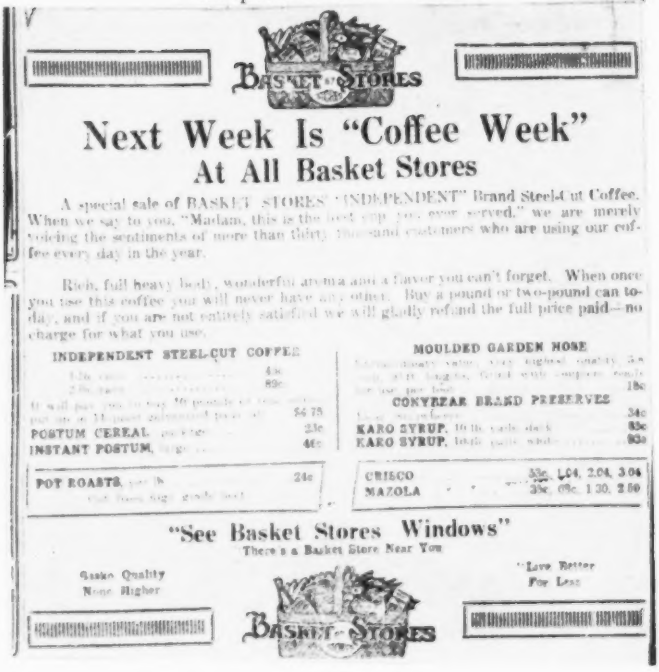


Next Week Is
"Flour and Baking Powder Week"
At All Basket Stores

SEE BASKET STORES WINDOWS

There's a Basket Store Near You

117 *Respondent's Exhibit 8.*



BASKET STORES

Next Week Is "Coffee Week"

At All Basket Stores

A special sale of BASKET STORES "INDEPENDENT" Brand Steel-Cut Coffee. When we say to you, "Madam, this is the best cup you ever served," we are merely voicing the sentiments of more than thirty thousand customers who are using our coffee every day in the year.

Rich, full heavy body, wonderful aroma and a flavor you can't forget. When once you use this coffee you will never have any other. Buy a pound or two-pound can today, and if you are not entirely satisfied we will gladly refund the full price paid—no charge for what you use.

INDEPENDENT STEEL-CUT COFFEE

4-lb. can 45c
2-lb. can 23c
It will pay you to buy 20 pounds or more per sack at Wholesale prices $4.75
POSTUM CEREAL 23c
INSTANT POSTUM 46c

POT ROASTS, per lb. 24c
Cut from big, grade beef

MOULDED GARDEN HOSE

Extra heavy value, very highest quality 5-ply, with couplings, fitted with couplers ready for use, per foot 18c

CONYBEAR BRAND PRESERVES

Large wide-mouth 34c
KARO SYRUP, 10-lb. table duck 85c
KARO SYRUP, blue, white or red 80c

CRISCO 55c, 1.04, 2.04, 3.04
MAZOLA 35c, 65c, 1.30, 2.50

"See Basket Stores Windows"

There's a Basket Store Near You

Same Quality
None Higher

"Love Better
For Less

BASKET STORES

118 *Respondent's Exhibit 9.*

Basket Stores Reduce High Cost of Living

BASKET STORES sell groceries and meats at the lowest possible margin of profit by elimination of charge accounts, by outright buying from the producer, and selling for cash direct to the consumer. We serve more than 20,000 customers daily, render expert service and sell the highest quality goods at the lowest price.

Next week is "SALAD DRESSING—OLIVE OIL AND VINEGAR WEEK" AT ALL BASKET STORES. Salads hold an important place in summer diet; and the goodness of the Salad depends mostly on the Salad Dressing. Here is a variety to tempt any palate, and all of proven merit—all savings to you of nearly 20 per cent, as witness these low prices:

WESBETT'S SALAD DRESSING and THOUSAND ISLAND DRESSING, both 12 oz., regular 35c value. Choice, per bottle 27c

PORTUGAL OLIVE OIL, half pints 39c
Quarts, 75c; pints 75c

CIDER VINEGAR, per gallon 45c

BASKO VINEGAR, 20 oz. 19c

BASKO VINEGAR, 32 oz. 25c

HONEY VINEGAR, pints 19c

HONEY VINEGAR, quarts 35c

SNIDER'S SALAD DRESSING—Large bottles, 35c; small size 25c

SNIDER'S CATSUP, 16 oz. bottle 25c

SNIDER'S CATSUP, 8 oz. bottle 15c

CONYBEAR PURE PRESERVES 16 oz. 25c

GLENCOE PURE FRUIT PRESERVES, 12 oz. jar, each 25c

QUAKER CORN FLAKES, very fine 11c

BASKO FLOUR, 48 lb., $1.39; 24 lb. sack $1.01

THRIFTY MAID FLOUR, 49 lb. $1.49

ZIPPY JELL, pkg. 11c

NEW POTATOES—Genuine Kaw Valley; car-load just in, while it lasts, lb. 4c

NUT MARGERINE, lb. 32c

Certified Butterine, 10-ounce pkg. 25c

"See Basket Stores Windows"

"There's a Basket Store Near You

"Live Better For Less"

119 *Respondent's Exhibit 10.*

When Basket Stores Will Sell at These Prices
Why Should You Trade Elsewhere?

NEXT WEEK WILL BE SPICE AND EXTRACT, FRUIT JARS AND JAR RING RUBBER WEEK AT ALL BASKET STORES. Our Spices are packed in dust-proof cartons and retain their flavor in cooking. Just pure Spices in every carton. Our Extracts are guaranteed pure and wholesome. Only the finest oils are used and Extracts produced are of exceptional flavor and strength. IT WILL PAY YOU TO BUY YOUR CANNING AND PICKLING REQUIREMENTS NOW.

FLAVORING EXTRACTS

RASKO QUALITY Vanilla, pure certain, 1 oz. ... 15c
3 oz. ... 39c

PURE SEASONING SPICES

Fibre Flavor Cans, per can ... 5c
QUAKER CORN FLAKES, the ideal Breakfast cereal, 6 oz. package ... 7½c
SNIDER'S CATSUP, 16 oz. bottle ... 25c
WHITE BORAX NAPTHA SOAP, 10 bars ... 49c
SHINOLA POLISH, all colors ... 9c
SHINOLA HOME SET, COMPLETE ... 39c
LILY WHITE RESTORER, for cleaning White Shoes, has no equal, regular 15c size ... 9c

MASON FRUIT JARS

Pints 69c, quarts 79c, ½ gal. ... $1.25

COLD PACK JAR RUBBERS

A shipment of RASKO JAR RUBBERS will reach us in a few days, price 4c, which will be 3c PER DOZEN. WAIT FOR THEM. They are better than any 15c Rubber.

CONSERVE PRESERVES, Strawberry flavor, per 15 oz. Jar ... 24c
FANCY RED ALASKA SALMON, tall ... 18c
FANCY PINK SALMON, tall cans ... 10c
MACKEREL MILK, tall cans ... 9c
WAHOLA CREAM for cleaning and polishing all colors of kid or calf leather; a brush, regular 25c bottle ... 19c

Fruit for Canning. Watch our prices by the case, of seasonable fruits.

Nut Margarine, 1 pound ... 32c

"See Basket Stores Windows"
"There's no Basket Store Near You"

Basko Quality Runs Higher

"Live Better For Less"

120 *Respondent's Exhibit 11.*

Beginning Tomorrow---A Sale of Breakfast Foods

At All Basket Stores

This sale, coming at a time when cool, appetizing and healthful summer breakfasts are necessary, and when the prices of Breakfast Foods are expected to advance, permits you an opportunity to select from a variety of quickly prepared cereals and other breakfast foods that includes practically every desired brand. Whatever is new and good in the way of Breakfast Foods you will find in BASKET STORES.

Quality is ever the watchword. Cleanliness is paramount. Modern fixtures assure the best sanitary protection. BASKET STORES' products are always fresh, due to rapid turn-overs. Our tremendous purchasing power for cash and our big outlet in more than 20,000 customers daily for cash enables us to sell at prices as low as 11c assure the savings of thousands of dollars to housewives who buy at BASKET STORES.

Quaker Corn Flakes, 8-oz. package 11c	Uncle Sam's Breakfast Food 23c
Quaker Oats, regular 25c package 19c	Oatmeal, in bulk, per lb. 6c
Quaker Oats, regular 15c package 12½c	Grape Nuts, always popular 14c
Quaker Corn Puffs, per package 13c	Kellogg's Krumbles, per package 14c
Quaker Puffed Rice, per package 13c	Kellogg's Corn Flakes, per package 13c
Quaker Puffed Wheat, per package 13c	Post Toasties, large package 23c
Quaker Mother's Wheathearts 23c	Postjohn's Breakfast Food 23c
Shredded Wheat, per package 14c	TIP BAKING POWDER, 1-lb. can 19c

OLD WHEAT FLOUR MAKES BETTER BREAD—THIS IS LAST OF SEASON

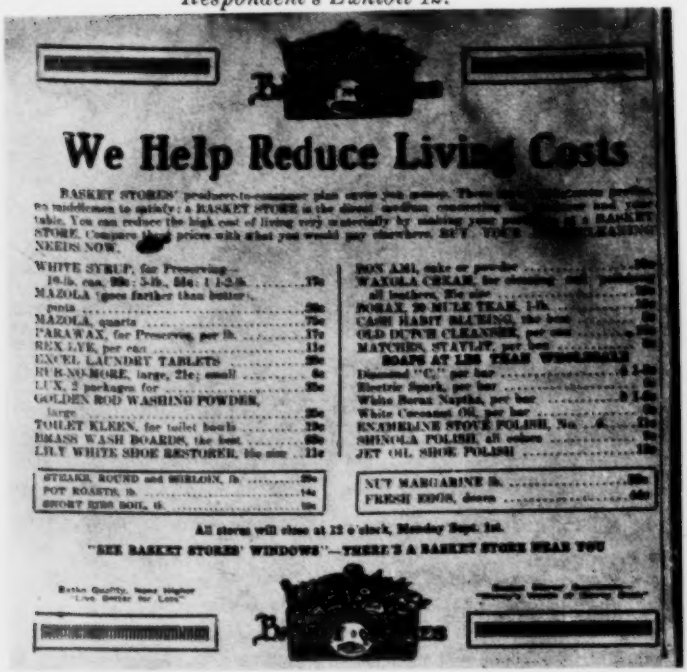
BASKO FLOUR, $2.20; THRIFTY HABIT, $2.20; GOLD MEDAL, $2.30; all in 48-lb. sacks

Watermelons—Another carload just unloaded, per lb. 2½c

Elberta Peaches—while this carload lasts, basket 3.40

"SEE BASKET STORES' WINDOWS"—THERE'S A BASKET STORE NEAR YOU

121 *Respondent's Exhibit 12.*



We Help Reduce Living Costs

BASKET STORES' produce-to-consumer plan saves you money. There is no unnecessary profit, no middleman to satisfy; a BASKET STORE is the direct medium connecting the farmer and your table. You can reduce the high cost of living very materially by making your purchases at a BASKET STORE. Compare these prices with what you would pay elsewhere. SEE YOUR [illegible] NEEDS NOW.

WHITE SYRUP, for Preserving—
10-lb. can, 99c; 5-lb., 55c; 1 1-2-lb. 17c
MAZOLA (goes farther than butter), pints 30c
MAZOLA, quarts 70c
PARAWAX, for Preserving, per lb. 17c
REX LYE, per can 11c
EXCEL LAUNDRY TABLETS 20c
RUB-NO-MORE, large, 21c; small 6c
LUX, 2 packages for 23c
GOLDEN ROD WASHING POWDER, large 23c
TOILET KLEEN, for toilet bowls 13c
BRASS WASH BOARDS, the best 69c
LILY WHITE SHOE RESTORER, the size 11c

BON AMI, cake or powder 10c
WAYOLA CREAM, for cleaning and preserving all leathers, 25c size 19c
BORAX 20 MULE TEAM, 1-lb. 10c
CASH HABIT BLUEING, the best 5c
OLD DUTCH CLEANSER, per can 10c
MATCHES, STAYLIT, per box 5c

SOAPS AT LESS THAN WHOLESALE

Diamond "C," per bar 6 1-2c
Electric Spark, per bar 6c
White Borax Naptha, per bar 6 1-2c
White Cocoanut Oil, per bar 6c
ENAMELINE STOVE POLISH, No. 4 ..... 15c
SHINOLA POLISH, all colors 9c
JET OIL SHOE POLISH 15c

STEAK, ROUND and SIRLOIN, lb. 25c
POT ROASTS, lb. 14c
SHORT RIBS BOIL, lb. 10c

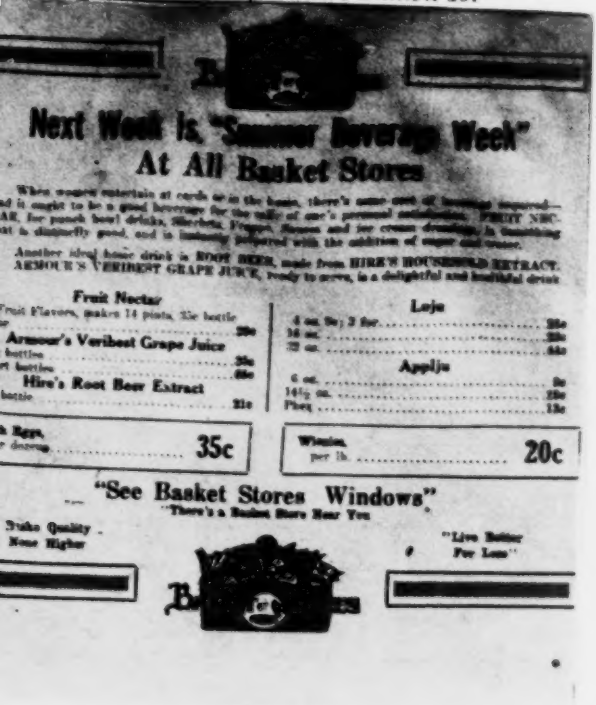
NUT MARGARINE lb. 25c
FRESH EGGS, dozen 60c

All stores will close at 12 o'clock, Monday Sept. 1st.

"SEE BASKET STORES' WINDOWS"—THERE'S A BASKET STORE NEAR YOU

Better Quality, Some Higher
Low Service for Less"

2 *Respondent's Exhibit 13.*



123 *Respondent's Exhibit 14.*

124 *Respondent's Exhibit 15.*

Next Week Is "Coffee Week"

At All Basket Stores

A special sale of BASKET STORES' "INDEPENDENT" Brand Steel-Cut Coffee. When we say to you, "Madam, this is the best cup you ever served," we are merely voicing the sentiments of more than thirty thousand customers who are using our coffee every day in the year.

Rich, full heavy body, wonderful aroma and a flavor you can't forget. When once you use this coffee you will never have any other. Buy a pound or two-pound can today, and if you are not entirely satisfied we will gladly refund the full price paid—no charge for what you use.

INDEPENDENT STEEL-CUT COFFEE

1-lb. cans 40c
2-lb. cans 80c

...ill pay you to buy 10 pounds of this coffee...
...pp in 14-quart galvanized pails, at $4.75
...TUM CEREAL, package 23c
...ANT POSTUM, large 40c

...OASTS, per lb. 34c
Cut from high grade beef.

MOULDED GARDEN HOSE

Extraordinary value, very highest quality, 5-8 inch, 50-ft. lengths, fitted with couplers ready for use, per foot 18c

CONTREAR BRAND PRESERVES

15-oz. Strawberry 34c
KARO SYRUP, 10-lb. pails, dark 88c
KARO SYRUP, 10-lb. pails, white 93c

CRISCO 43c, 1.04, 2.04, 4.04
MAZOLA 23c, 60c, 1.20, 2.30

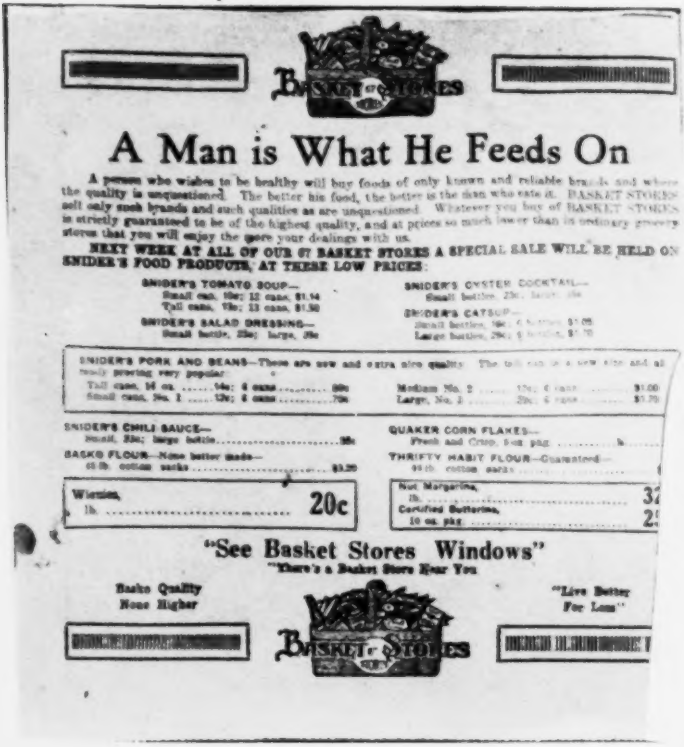
"See Basket Stores Windows"

"There's a Basket Store Near You

...ho Quality
...o Higher

"Live Better
For Less"

125 *Respondent's Exhibit 16.*



126 *Respondent's Exhibit 17.*

Next Week Is Tea and Coffee Week

AT ALL BASKET STORES

Considering the cost, there is absolutely nothing that you can have on the table that will afford as much comfort and satisfaction as GOOD Teas and Coffees. BASKET STORES make a specialty of GOOD Teas and Coffees. Fresh and fragrant choice Japan Teas are the ones we offer you. They represent first-crop pickings, fresh, tender leaves, carefully prepared.

INDEPENDENT Coffee in cans, and BASKO Coffee in bulk, are equally good and have wonderful flavor and aroma. These brands make the best cup you can serve. They are more sustaining, more fragrant and more economical than most Coffees—one pound will give about 80 cups. If you have not yet tried these brands, buy a pound or two, and if you are not entirely satisfied we will gladly refund the full purchase price—no charge for what you use.

BASKO TEA, loose leaf, ¼ lb.	25c
BASKO TEA, per package, ½ lb.	15c
Black English Breakfast Tea, lb.	60c
Uncolored Japan Tea, per lb.	60c
Gunpowder Tea, per lb.	60c
Tea Siftings, special, per lb.	25c
INDEPENDENT COFFEE, per 1-lb. can	30c
3-lb. can 90c; 5 lb. can	$1.45
IT WILL PAY YOU TO BUY 10 LBS. OF THIS COFFEE, put up in 14 qt. pails at $4.75	
BASKO COFFEE, in bulk, per lb.	45c
CASH HABIT COFFEE, in bulk, per lb.	40c

OTHER MONEY SAVING SPECIALS

CUDAHY BORAX NAPTHA SOAP, bar	5c
DIAMOND "C" SOAP, per bar	6½c
CRYSTAL WHITE SOAP, per bar	7c
RUB-NO-MORE, large, 21c; small	6c
QUAKER CORN FLAKES, 8-oz. package	11c
QUAKER OATS, large package	29c
AMBASSADOR SARDINES, Tomato Sauce, 1-lb. cans	23c
RED ALASKA SALMON, 1-lb. cans	23c
PINK SALMON, 1-lb. cans	20c
JIFFY JELL ICE CREAM POWDER, (while they last), special, 3 pkgs. for	25c
BASKO MACARONI AND SPAGHETTI, 8-oz.	8c

Watermelons, per pound 3c

Nut Margarine, per pound 32c

There's a Basket Store Near You.
"SEE BASKET ST ORES WINDOWS"

Basko Quality Wins Higher

Live Better For Less

127 *Respondent's Exhibit 18.*

[redacted] BASKET STORES [redacted]

Cocoa and Chocolate Week

AT ALL BASKET STORES

BEGINNING TOMORROW, ALL BASKET STORES WILL DEVOTE A SOLID WEEK TO A SALE OF COCOA AND CHOCOLATE. WHY? BECAUSE WE WANT EVERYONE TO TRY "BASKO" COCOA AND CHOCOLATE. These are particularly fine, and, as food drinks, for candy-making in the home and for frostings for cakes, they are really delightful. Absolutely pure and full strength.

Cocoa is more nourishing and palatable than most beverages—and very economical—a spoonful makes a cup—about 90 cups to a pound—giving over two cups of cocoa for a cent. It is healthful and nourishing, and the best drink for children. Easily prepared, too—just add hot water and sugar and it is ready to serve. The price is advancing and it will pay you to lay in a supply now. ASK FOR "BASKO" BRAND—YOU WILL LIKE IT.

BASKO COCOA, per ½-lb. tins	21c
WALTER BAKER'S COCOA—	
1-3-lb. tins	11c
1-2-lb. tins	37c
W. H. BAKER'S COCOA, ½-lb. tins	22c
WALTER BAKER CHOCOLATE, ½-lb. tins	25c
W. H. BAKER'S CHOCOLATE, ½-lb. tins	22c
COCOA, in bulk, per lb.	30c

OTHER MONEY-SAVING ITEMS

BUY SOAP NOW—THESE PRICES ARE LESS THAN WHOLESALE LISTS:

Diamond "C" Soap, 10 bars	43c
White Borax Naptha, 10 bars	43c
Electric Spark Soap, 10 bars	60c
Golden Rod Washing Powder, 30c size	25c
Rub-No-More, large, 21c; small	6c
Quaker Corn Flakes, 15c size	11c
Strawberry Apple Base Preserve, 15 oz.	23c
Cash Habit Corn, extra standard	16c
Thrift Corn, Iowa pack, per can	13c
Cash Habit Tomatoes, extra quality— 3-lb. cans, 19c; 2-lb. cans	14c

OLD WHEAT FLOUR MAKES BETTER BREAD—THIS IS LAST OF SEASON

BASKO FLOUR, $5.20; THRIFTY HABIT, $5.10; GOLD MEDAL, $5.30; all 48 pound sacks

Round and Sirloin Steak, lb.	29c
Pot Roasts, lb.	16c
Nut Margarine, 1-lb. pkg.	32c

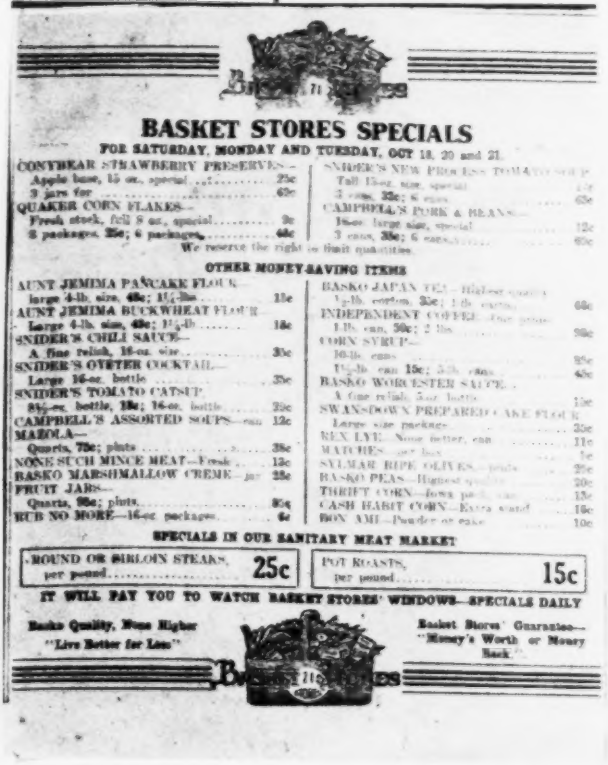
"BEE BASKET STORES' WINDOWS"—THERE'S A BASKET STORE NEAR YOU

Basko Quality. None Higher "Live Better for Less"

[redacted] BASKET STORES [redacted]

Basket Stores' Guarantee— "Money's Worth or Money Back"

128 *Respondent's Exhibit 19.*



BASKET STORES SPECIALS

FOR SATURDAY, MONDAY AND TUESDAY, OCT 18, 20 and 21.

CONTHEAR STRAWBERRY PRESERVES—
Apple base, 15 oz. special 25c
3 jars for 65c
QUAKER CORN FLAKES—
Fresh stock, full 8 oz., special 9c
2 packages, 25c; 6 packages 46c
We reserve the right to limit quantities.

SNIDER'S NEW PROCESS TOMATO SOUP
Tall 10oz. size, special 11c
3 cans, 32c; 6 cans 63c
CAMPBELL'S PORK & BEANS—
16-oz. large size, special 12c
3 cans, 35c; 6 cans 65c

OTHER MONEY-SAVING ITEMS

AUNT JEMIMA PANCAKE FLOUR—
large 4-lb. size, 40c; 1½-lbs. 11c
AUNT JEMIMA BUCKWHEAT FLOUR—
Large 4-lb. size, 40c; 1½-lb. 14c
SNIDER'S CHILI SAUCE—
A fine relish, 16-oz. size 30c
SNIDER'S OYSTER COCKTAIL—
Large 16-oz. bottle 35c
SNIDER'S TOMATO CATSUP
8½-oz. bottle, 15c; 16-oz. bottle 23c
CAMPBELL'S ASSORTED SOUPS—can 12c
MADOLA—
Quarts, 75c; pints 38c
NONE SUCH MINCE MEAT—Fresh 12c
BASKO MARSHMALLOW CREME—jar 25c
FRUIT JARS—
Quarts, 90c; pints 85c
RUB NO MORE—16-oz package 6c

BASKO JAPAN TEA—Highest quality
½-lb. carton, 35c; 1-lb. carton 69c
INDEPENDENT COFFEE—Fine grade
1-lb. can, 30c; 2 lbs. 58c
CORN SYRUP—
10-lb. cans 95c
1½-lb. can 15c; 3-lb. cans 45c
BASKO WORCESTER SAUCE—
A fine relish, 5-oz. bottle 10c
SWANS-DOWN PREPARED CAKE FLOUR
Large size package 35c
REX LYE—None better, can 11c
MATCHES—per box 5c
SYLMAR RIPE OLIVES—pints 25c
BASKO PEAS—Highest quality 20c
THRIFT CORN—Iowa pack, can 15c
CASH HABIT CORN—Extra stand 10c
BON AMI—Powder or cake 10c

SPECIALS IN OUR SANITARY MEAT MARKET

ROUND OR SIRLOIN STEAKS, per pound 25c

POT ROASTS, per pound 15c

IT WILL PAY YOU TO WATCH BASKET STORES' WINDOWS—SPECIALS DAILY

Basko Quality, None Higher
"Live Better for Less"

Basket Stores' Guarantee—
"Money's Worth or Money Back"

129 *Respondent's Exhibit 20.*

BASKET STORES

Your Sunday Dinner Will Be Better

Much of the pleasure of your dinner depends on the quality of the Preserves and Jellies or Ice Cream. BASKET STORES are headquarters for all kinds of these delicious foods. Our brands of Preserves and Jellies represent the finest quality of pure fruits, put up by the best canners, and always by far than they can be canned in your own home.

BEGINNING TOMORROW, FOR A WEEK, BASKET STORES WILL OFFER A COMPLETE VARIETY OF PRESERVES, JAMS AND ICE CREAM POWDERS AT THESE LOW PRICES

CONYBEAR PURE PRESERVES, 15 oz.	34c	JIFFY JELL, 11c; JELLO, pkg.	7½c
APPLE BASE PRESERVES, 15 oz.	29c	JELLO AND JIFFY JELL ICE CREAM POWDERS, while they last, 3 pkgs. for	25c

OTHER MONEY SAVING ITEMS

BASKO MACARONI, finest made, pkg.	8c	WRIGHT'S SALAD and THOUSAND ISLAND DRESSINGS, 4fluoz 35c bottles	27c
THRIFT CORN, Iowa standard, can	13c	CORN SYRUP, 10-lb. can	85c
CASH HABIT TOMATOES, extra quality—2-lb. cans, 15c; 2½-lb. cans	14c	WHITE SYRUP, 10-lb. can	89c
CAMPBELL'S SOUPS, per can	12c	1½-lb. can	17c
KUB-O-MORE, 30c size, 21c; small	9c	QUAKER CORN FLAKES, 8-oz. pkg.	11c
TOILET KLEEN, regular 25c can	19c	BASKO JAR RUBBERS, finest quality, doz.	8c

Steaks—Round, Sirloin, lb.	25c
Pot Roasts, lb.	14c
Short Rib Boil, lb.	10c

Nut Margarine, lb.	32c
Certified Butterine, 10 oz. pkg.	24c

"SEE BASKET STORES' WINDOWS"—THERE'S A BASKET STORE NEAR YOU

BASKET STORES

130 *Respondent's Exhibit 21.*

Save Nearly 20 Per Cent on Food Bills

In these days of high cost of living, BASKET STORES stand pre-eminently as the direct medium between the producer and the consumer. We have eliminated every possible expense and pass along savings to the consumer of nearly 20 per cent on more than 300 average grocery and meat items. BASKET STORES' quality is always the highest.

NEXT WEEK IS CANNING AND PRESERVING WEEK AT ALL BASKET STORES. It will pay you to put up all the fruit you can. A complete line of canning necessities will be on sale. NOTE THESE LOW EVERYDAY PRICES

MASON FRUIT JARS, pints, per doz. 85c
½ gals. $1.25; quarts, per doz. 95c
JELLY GLASSES, ½ pint, per doz. 35c
PURE SPICES, shaker cans, each 9c
HEINZ VINEGAR, quarts, 25c; pints 15c

BASKO JAR RUBBERS, finest made, equal to any 15c quality, doz. 9c
CIDER VINEGAR, 40 gr., per gallon 65c
BASKO CIDER VINEGAR— quarts, 25c; pints 15c

OTHER MONEY SAVING ITEMS

BASKO PURE EXTRACTS, Vanilla— 2 oz., 25c; 1 oz. bottles 15c
TIP BAKING POWDER, 1 lb. cans 19c
BASKO MACARONI or SPAGHETTI 8c
JELLO, 11½c; JIFFY JELL 11c
PINK SALMON, 1 lb. tall cans 23c
WRIGHT'S SALAD AND THOUSAND ISLAND DRESSINGS, 35c size, choice 27c

SNIDER'S CATSUP, 16 oz. bottle 20c
SNIDER'S PORK AND BEANS, tall cans 14c
SNIDER'S TOMATO SOUP, tall cans 15c
CAMPBELL'S SOUPS, assorted, can 15c
QUAKER CORN FLAKES, 8 oz. pkg. 11c
QUAKER OATS, large 20c; small 12½c
ARM AND HAMMER SODA, 1 lb. pkg. 8c
AMBASSADOR SARDINES, very fine, 1 lb. 23c

Round and Sirloin Steak, lb. 23c
Pot Roasts, lb. 14c
Short Rib Boil, lb. 10c
Rib Roasts, lb. 16c

Nut Margarine, lb. 32c
Fresh Eggs, doz. 44c

"SEE BASKET STORES' WINDOWS"—THERE'S A BASKET STORE NEAR YOU

Basko Quality, None Higher "Live Better for Less"

"Basket Stores' Guarantee— "Money's Worth or Money Back"

131 *Respondent's Exhibit 22.*

BASKET STORES

BASKET STORE SPECIALS

ON SIX DAYS, SATURDAY OCT. 25 TO FRIDAY OCT. 31

CAMPBELL'S ASSORTED SOUPS
Nationally known and popular.
Special, per can **10c**

ALCADIA LEMON PIE FILLER
Delightful pie and cake filler.
Special, per package **7½c**

AUNT JEMIMA PANCAKE FLOUR
Makes those golden brown cakes.
Special, 12½ lb package **13c**

AUNT JEMIMA PANCAKE FLOUR
Buy the large size and save money.
Special, 40 lb package **41c**

We reserve the right to limit quantities

OTHER MONEY SAVING ITEMS

CORN SYRUP, 10 lb. cans 85c
5 lb cans, 49c; 1½ lb cans 19c
WHITE SYRUP, 10 lb. cans 93c
5 lb cans, 51c; 1½ lb cans 18c
QUAKER WHEATHEARTS, large size 29c
QUAKER CORN FLAKES, 8 oz. package 10c
COCOA, in bulk, per pound 30c
SNIDER'S TOMATO CATSUP,
16 oz bottle, 29c; 8 oz. bottle 18c
RUMFORD BAKING POWDER,
Large size, 21c; small size 6c
DIAMOND "C" LAUNDRY SOAP,
Always popular, per bar 4½c
CONYBEAR STRAWBERRY PRESERVES,
Apple base, 15 oz. jar 29c

ROUND AND SIRLOIN STEAKS, lb. 25c
POT ROASTS, lb 19c

CANNABAR CURE PRESERVES,
[illegible] 35c
BASKET FLOUR, 24 lb sacks, $1.07, 48 lb $2.13
SWANSDOWN CAKE FLOUR, large size 39c
AUNT JEMIMA BUCKWHEAT FLOUR,
2 lb. pkg. 16c, 4 lb size 49c
HP BAKING POWDER, 1 lb can 19c
CASH HABIT BIKE SELTZ, per bottle 14c
BASKO MACARONI AND SPAGHETTI,
[illegible] 8c
ARM AND HAMMER SODA, 1 lb package 8c
BASKO TEA, our pride and leader,
1 lb carton, 69c; ½ lb carton 35c
CASH HABIT JAPAN TEA, a fine tea,
1 lb carton, 60c; ½ lb carton 31c

WILSON'S NUT MARGARINE, lb. 32c
A good substitute for high priced butter.

SPECIALS DAILY—IT WILL PAY YOU TO WATCH BASKET STORES WINDOWS

Basko Quality, None Higher
"Live Better for Less"

Basket Stores Guarantee
"Money's worth or Money Back."

Lincoln Neb.
10/24/19

132 *Respondent's Exhibit 23.*

BASKET STORES

BASKET STORES SPECIALS

For Six Days, Saturday, Oct. 25 to Friday, Oct. 31.

CAMPBELL'S ASSORTED SOUPS—Nation ally known and popular
SPECIAL, per can 10c

ARCADIA LEMON PIE FILLER
SPECIAL 7½c

AUNT JEMIMA PANCAKE FLOUR—Makes those golden brown cakes
SPECIAL, 1½ lb. pkg 13c

AUNT JEMIMA PANCAKE FLOUR. Buy the large size and save money
SPECIAL, 4 lb. pkg 41c

We Reserve the Right to Limit Quantities.

OTHER MONEY-SAVING ITEMS

CORN SYRUP, 10 lb. cans 83c
5 lb. cans, 45c; 1½ lb. cans 13c
WHITE SYRUP, 10 lb. cans 73c
5 lb. cans, 37c; 1½ lb. cans 10c
QUAKER WHEATHEARTS, large size 23c
QUAKER CORN FLAKES, 8 oz. 10c
COCOA, in bulk, per lb. 30c
SNIDER'S TOMATO CATSUP, 10 oz. 8 oz. size 25c 18c
RUB NO MORE WASHING POWDER, large size 21c
Small size 8c
DIAMOND "C" LAUNDRY SOAP, always popular, per bar 6½c

CONYBEAR STRAWBERRY PRESERVES
CONYBEAR PURE PRESERVES
BASKO FLOUR
SWANDOWN CAKE FLOUR, large size
AUNT JEMIMA BUCKWHEAT FLOUR
TIP TOPPING POWDER, 1 lb. cans
CASH HABIT BIRD SEED
BASKO MACARONI AND SPAGHETTI, per pkg.
ARM AND HAMMER SODA, 1 lb. pkg
BASKO TEA, Our pride and leader, ¼ lb. carton

Round and Sirloin Steak, lb 25c
Pot Roasts, lb 18c

Wilson's Nut Margarine, lb 32c
A good substitute for high priced butter

Specials Daily—It Will Pay You to Watch Basket Stores Windows

Basko Quality, home tested
Live Better for Less

Basket Stores Guarantee
Money's Worth or Money Back

BASKET STORES

Mdse. Stat. J.
10-25-19

133 *Respondent's Exhibit 24.*

10/31/47.

BASKET STORES SPECIALS

For Six Days, Saturday, Oct. 31 to Friday, Nov. 7

NAVY BEANS—A close-out price, per lb. 9c	RUMFORD BAKING POWDER—Full one pound cans, per can..... 22c
BASKO JELLY POWDER—Makes delightful desserts, per pkg. 7½c	LARD COMPOUND—A very low price, per lb. 28c

We Reserve the Right to Limit Quantities.

OTHER MONEY-SAVING ITEMS

BASKO FLOUR, 24 lb. cotton sack 1.87
BASKO FLOUR, 48 lb. cotton sack 3.59
AUNT JEMIMA PANCAKE FLOUR—1½ lb. sacks, 15c; 4 lb. sacks 43c
AUNT JEMIMA BUCKWHEAT FLOUR—1½ lb. sacks, 16c; 4 lb. sacks 43c
TIP BAKING POWDER, our leader, full one pound can 19c
SNIDER'S PORK & BEANS, tall can 14c
CAMPBELL'S PORK & BEANS, per can 10½c
SNIDER'S CHILI SAUCE, large size 20c
SNIDER'S CATSUP, large 25c size 19c
CAMPBELL'S SOUPS, assorted, can 12c
NONE SUCH MINCE MEAT, fresh, pkg. 13c
FANCY HEAD RICE, finest quality, lb. 10c
MASON JARS, quarts, 95c; pints 80c

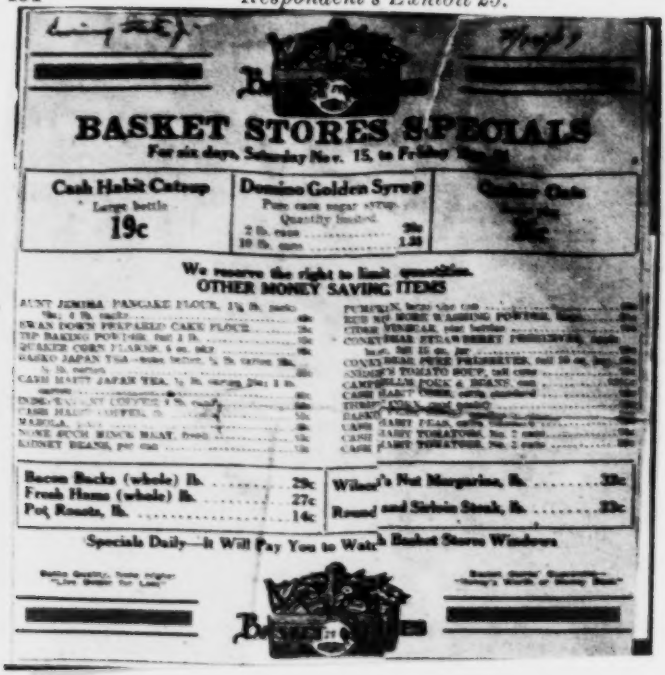
RED ALASKA SALMON, tall cans 25c
PINK SALMON, tall cans 27c
CONVBEAR PURE PRESERVES, finest quality, full 15 oz. jar 23c
BASKO MACARONI AND SPAGHETTI, full 8 oz. sizes, choice, per pkg. 8c
INDEPENDENT COFFEE, highest quality, 1 lb. can 53c; 2 lb. can 93c
DIAMOND "C" SOAP, per bar 4½c
CASH HABIT BLUING, per bottle 8c
OLD DUTCH CLEANSER, per can 10c
RICE LYE, none better, per can 10c
MATCHES, per box 8c
TOOTH PICKS, per box 6c
MORTON'S HANDY SHAKER SALT 9c

Round and Sirloin Steak, lb. ..... 33c Pot Roasts, lb. 15c	Jonathan Apples, quantity limited, per box $3.15

Specials Daily—It Will Pay You to Watch Basket Stores Windows

Basket Stores' Guarantee—"Money's Worth or Money Back"

134 *Respondent's Exhibit 25.*



BASKET STORES SPECIALS

Cash Habit Catsup
Large bottle
19c

Domino Golden Syrup
Pure cane sugar syrup
Quantity limited
2 lb. cans 20c
10 lb. cans 1.35

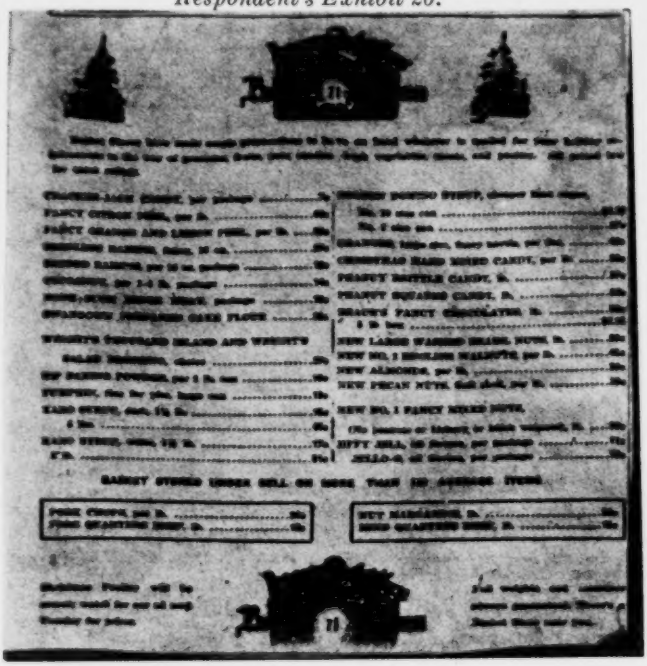
We reserve the right to limit quantities.
OTHER MONEY SAVING ITEMS

Bacon Backs (whole) lb. 25c
Fresh Hams (whole) lb. 27c
Pot Roasts, lb. 14c

Wilson's Nut Margarine, lb. 33c
Round and Sirloin Steak, lb. 33c

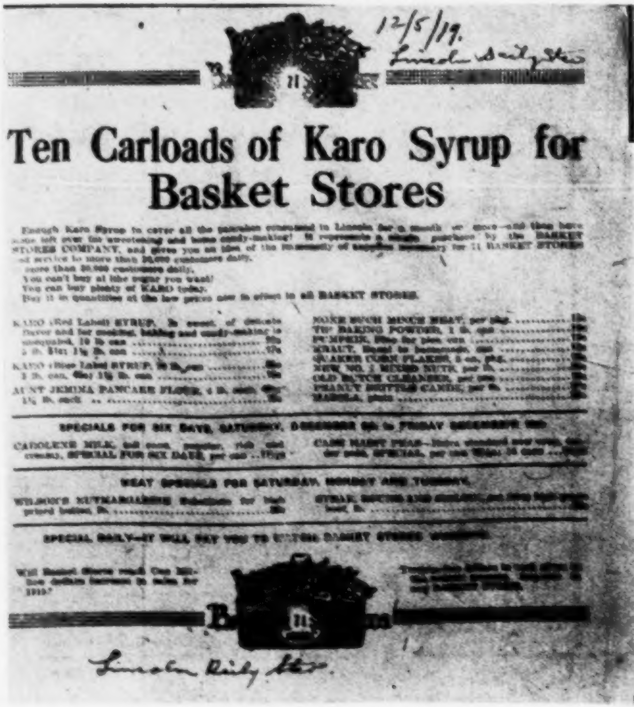
Specials Daily—It Will Pay You to Watch Basket Stores Windows

135 *Respondent's Exhibit 26.*



136 *Respondent's Exhibit 27.*

137 *Respondent's Exhibit 28.*

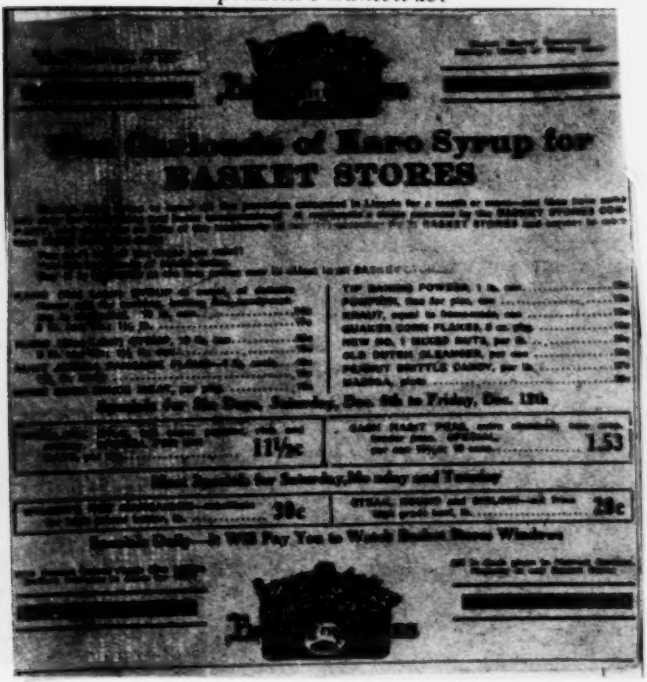


12/5/19.
Lincoln Daily Star

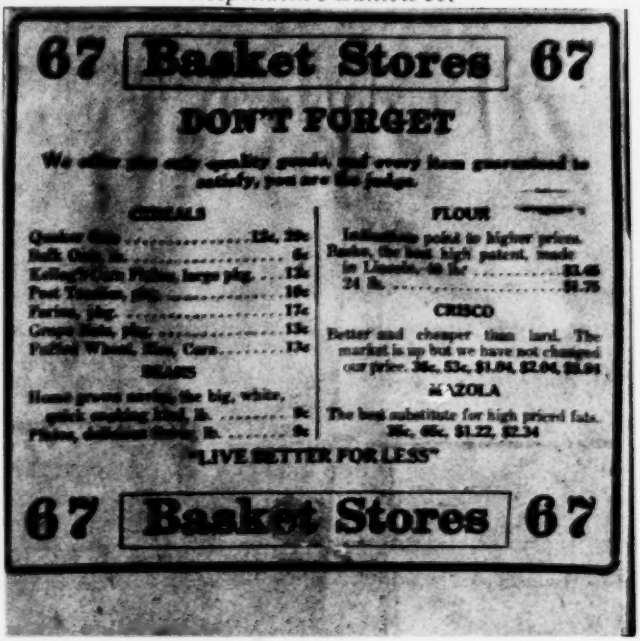
Ten Carloads of Karo Syrup for Basket Stores

Lincoln Daily Star.

138 *Respondent's Exhibit 29.*



Respondent's Exhibit 30.



The Basket Stores Co.'s

CASH-AND-CARRY GROCERY PLAN

As Told In a Recent Interview by W. D. WILLIAMS, Pres.

W. D. Williams here tells something of the future plans of the Basket Stores Co: The cash and carry plan, to my mind, is the coming method of distribution. What we propose to do is to bring the producer just as close as possible to the consumer.

During this High-Cost-of-Living time, which apparently is here to stay until the allies win the war, we are going to open many more stores for the convenience of the buying public.

Our organization is now complete. We have secured the services of Mr. H. A. Turner, who has been connected with the Great Atlantic and Pacific Tea Company for the past fifteen years. This concern operates a chain of nearly 4,000 retail grocery stores. Mr. Turner has opened more than 100 stores for them in the New England states and more than 90 stores in Philadelphia. He is now with us. I have appointed Mr. Turner superintendent of stores. We have also secured the services of Mr. L. W. Perry, an expert accountant, whom I have appointed office manager. We are now organized to carry out our plans of development.

Ten years ago we had but one store—today we are operating forty-four stores in Omaha, Lincoln, Council Bluffs and surrounding territory. Our business has grown from a one-store volume of $12,000 to forty-four stores doing a business of $2,141,000.00 in 1917.

The ordinary grocery store has the following expenses: Delivery cost, 10 per cent; charge accounts, bad debts, collections and bookkeeping, 10 per cent. The Cash-and-Carry plan saves you all of this expense.

Many of our patrons tell us that they save at least 10c on every dollar they spend at the Basket Stores. Figuring on their own statements, we have saved the patrons of our stores during the year 1917 $535,750.00.

Every article in the Basket Stores is plainly marked with the weight and price. You pay the same price as your neighbors pay. "A child can buy as cheap as a grown-up." No special sales or leaders. We have at least 200 prices which are lower than those of the grocery who charges for credit, bad debts, delivery and errors in charging accounts.

We intend to open more self-serve stores; the customer can bring her basket, go direct to the shelves, examine and taste and pick out what she wants. Everything will be plainly marked with the price and weight. We are going to do away with all expensive packing cases, and put a price on the merchandise that will pay the customer to come and get the exact thing they want and carry it home. No delivery, no bookkeeping, no extra wrapping or twine expense. All packages will be put into a paper bag convenient to carry. You will get a statement of your purchase on an adding machine, the cashier will do all of the checking and wrapping. Our aim will be to give quick service; no waiting; you take your time.

All goods will be arranged in sections, so that you will know where to find each item.

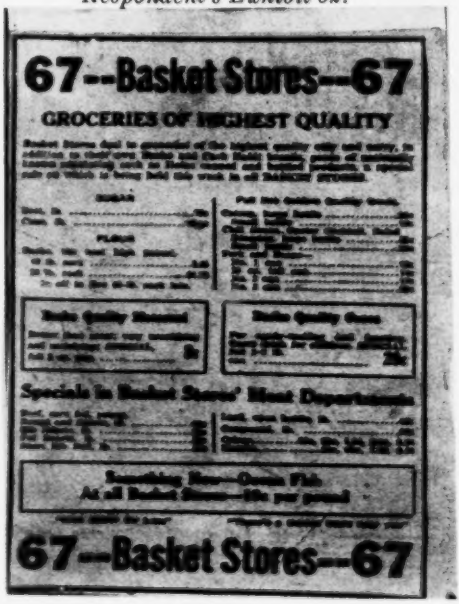
As soon as we are located in our new warehouse, we plan to have our own Cold Storage Plant and a Modern Bakery. This warehouse will be a direct service to the consumer. Take, for instance, in our Meat Department, we will have one central meat cutting station, where meat will be cut and wrapped in clean parafine paper, all weighed and marked. You pick out what you want from a sanitary chilled display case.

You will pay for no boxes or ice, but only for what you want and get. Any special cuts you wish, you can place your order the day before at any of our stores and we will prepare them for you. The display cases will have Automatic Refrigerator Machines. The meat will be all under cover. There will be no dirt or spoiled meat left about to taint the good meat. We will only handle the very best, fresh cuts, and if the meat is not satisfactory, the price paid will be refunded.

You will see just what you are buying. We have always realized that it pays to sell quality goods and give full weight. Now the next thing is to eliminate all unnecessary expense and lessen the price of the items we sell, so that the customer will get the most for his hard earned dollars. The Basket Stores' system of Cash-and-Carry certainly means a saving to the careful buyer, to whom patronage we are largely indebted for the enlarged success of the Basket Stores.

We will also manufacture Mail Order Departments, so that patrons far distant from our stores may take advantage of our very low prices.

141 *Respondent's Exhibit 32.*



142 Section VII.

Application of respondent for oral submission of charges.

Comes now Raymond Bros.-Clark Company and respectfu
shows the commission that the complaint herein involves the char
on the part of the Federal Trade Commission that Raymond Bro
Clark Company is guilty of unfair practices in commerce and th
the same is in violation of section 5 of the Federal Trade Comm
sion act; that said charge is based upon a single transaction a
therefrom necessarily arises the question of whether or not su
could constitute, in any event, unfair methods of commerce. Ref

ence is hereby made to the statement of facts constituting the charge appearing in the complaint and therefrom it will appear that it is claimed by the commission that the refusal to purchase merchandise from T. A. Snider Preserve Company by Raymond Bros.-Clark Company, for the reason that T. A. Snider Preserve Company was engaged in selling merchandise to Basket Stores Company operating a chain of retail stores; that this charge involves the question of whether or not Raymond Bros.-Clark Company can, for any reason sufficient to itself, select the persons from which it will purchase its merchandise; that it further appears that Basket Stores Company is engaged in the retail grocery business and it is claimed that the statement made by Raymond Bros.-Clark Company, although in fact the truth that Basket Stores Company was a retail grocery, constitutes a violation of section 5 of the Federal Trade Commission act.

Raymond Bros.-Clark Company therefore ask that an or- questions involved are of national interest the presentation should be complete with a view of reaching a correct solution.

Raymond Bros.-Clark Company therefore ask that an order be entered authorizing the submission upon oral argument and that a time be fixed for the submission of the questions.

Respectfully submitted.

TINLEY, MITCHELL, PRYOR, ROSS & MITCHELL,
Attorneys for Raymond Bros.-Clark Co.

(Signed) EMMET TINLEY, *Of Counsel.*

143

Section VIII.

WCR-MP 3-17 20
Address communications to Federal Trade Commission.

In replying please quote

[Copy.]

FEDERAL TRADE COMMISSION,
Washington, March 17, 1920.

TINLEY, MITCHELL, PRYOR, ROSS & MITCHELL,
Fourth Floor Rogers Block, Council Bluffs, Iowa.

In re: Federal Trade Commission vs. Raymond Bros.-Clarke Co.
Docket 460.

GENTLEMEN:

Answering your letter of March 11, with which you transmit application for oral argument in the above entitled proceeding, you are advised that this matter has been set for final hearing and submission to the commission at its offices in Washington, D. C., on Thursday, March 25, 1920, at 2.30 p. m. upon complaint, answer, testimony, briefs, and oral argument.

Very truly yours,

FEDERAL TRADE COMMISSION.
CLAUDE R. PORTER, *Chief Counsel.*

Section IX.

(Report and findings of the Federal Trade Commission omitted at this place to avoid duplication, the same appearing at marginal page 11 of this record.)

Section X.

Order of the Federal Trade Commission.

UNITED STATES OF AMERICA,
Before Federal Trade Commission, ss:

At a regular session of the Federal Trade Commission, held at its office in the city of Washigton, D. C., on the 23rd day of February, A. D. 1921.

144 Present: Huston Thompson, chairman; Nelson B. Gaskill, Jno. Garland Pollard, Victor Murdock, John F. Nugent, Commissioners.

FEDERAL TRADE COMMISSION vs. RAYMOND BROS.-CLARK CO.	Docket No. 460.

Order to cease and desist.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the commission, the answer of the respondent, the testimony and evidence, and the argument of counsel, and the commission being of opinion that the method of competition in question is prohibited by the act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and having made its reports in which it stated its findings as to the facts with its conclusion that the respondent has violated the provisions of said act, it is therefore

Ordered, That the respondent, Raymond Bros.-Clark Co., its officers and agents, forever cease and desist from directly or indirectly—

(1) Hindering or preventing any person, firm, or corporation in or from the purchase of groceries, provisions, or the like commodities direct from the manufacturers or producers thereof, in interstate commerce, or attempting so to do.

(2) Hindering or preventing any manufacturer, producer, or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.

(3) Influencing or attempting to influence any manufacturer, producer, or dealer in groceries, provisions, and the like commodities not to accept as a customer any firm or corporation with the manufacturer, producer, or dealer in the exercise of a free judgment, has or may desire to have such relationship.

And it is further ordered, That the respondent, Raymond Bros.-Clark Co., shall, within sixty days of the service upon it of a copy

of this order, file with the commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desi*ts* hereinbefore set out.

By the commission:

[SEAL.]

(Signed) J. P. YODER,
Secretary.

145

Section XI.

Report of Raymond Bros.-Clark Co. to J. P. Yoder, secretary of the Federal Trade Commission, April 13, 1921.

OFFICE OF RAYMOND BROS.-CLARK CO.,
WHOLESALE GROCERS,
Lincoln, Nebr., April 13, 1921.

J. P. YODER,
Sec'y Federal Trade Commission,
Washington, D. C.

DEAR SIR: Answering your favor of Feb. 23, forwarding to us the order of the Federal Trade Commission, in Docket No. 460, we wish to assure you that we are living up to this order in every way, shape, and manner, and are following its instructions to the letter.

Your very truly,

RAYMOND BROS.-CLARKE CO.
By WM. H. RAYMOND, *Pt.*

Section XII.

Copy of letter acknowledging report of respondent, dated April 18, 1921.

Address communications to Federal Trade Commission.

In replying please quote

FEDERAL TRADE COMMISSION,
Washington, April 18, 1921.

RAYMOND BROS.-CLARKE CO.,
Lincoln, Neb.

GENTLEMEN: Receipt is acknowledged of your letter of the 13th inst., in which you report that you are fully complying with
146 the terms of the order issued by the commission on February 23rd, 1921, in the matter of the complaint, Docket 460.

The commission greatly appreciates your cooperation in this matter and extends its thanks for your promptness in reporting observance of the order.

Your very truly,

(Signed) ADRIEN F. BUSICK,
ADRIEN F. BUSICK,
Acting Chief Counsel.

Filed Jun. 8, 1921. E. E. Koch, clerk.

147 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

APPEARANCE OF COUNSEL FOR PETITIONER.

(Filed Apr. 27, 1921.)

The clerk will enter my appearance as counsel for the petition

EMMET TINLEY,
W. E. MITCHELL,
J. C. PRYOR, Jr.,
D. L. ROSS,
EDWIN D. MITCHELL,
All of Council Bluffs, Iowa

APPEARANCE OF COUNSEL FOR RESPONDENT.

(Filed Oct. 17, 1921.)

The clerk will enter my appearance as counsel for the responde

ADRIEN F. BUSICK,
WILLIAM C. REEVES,
Federal Trade Commission, Washington, D. C

ORDER OF SUBMISSION.

December Term, 1921. Monday, January 16, 1922.

This mater having been called for hearing in its regu
148 order, argument was commenced by Mr. Emmett Tinley
petitioner, continued by Mr. Adrien F. Busick for responde
and concluded by Mr. Emmett Tinley for petitioner.

Thereupon said matter was submitted to the court on the s
petition, the record before the Federal Trade Commission, and
briefs of counsel filed herein.

149 OPINION.

(Filed May 8, 1922.)

Mr. Emmett Tinley (Mr. W. E. Mitchell and Messrs. Tinl
Mitchell, Pryor, Ross, and Mitchell were with him on the brie
for petitioner.

Mr. Adrien F. Busick (Mr. W. H. Fuller was with him on
brief), for respondent.

Before Sanborn and Carland, circuit judges, and Trieber, distr
judge.

CARLAND, Circuit Judge, delivered the opinion of the court.

This is an original proceeding by petitioner to obtain a revi
of an order of the commission whereby petitioner, its officers a

agents were ordered to forever cease and desist from directly or indirectly—

"(1) Hindering or preventing any person, firm, or corporation in or from the purchase of groceries, provisions, or the like commodities direct from the manufacturers or producers thereof, in interstate commerce, or attempting so to do.

"(2) Hindering or preventing any manufacturer, producer, or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.

"(3) Influencing or attempting to influence any manufacturer, producer, or dealer in groceries, provisions, and the like commodities not to accept as a customer any firm or corporation with the manufacturer, producer, or dealer in the exercise of a free judgment has or may desire to have such relationship."

This order was made in a proceeding commenced by the commission against petitioner for the alleged violation of the provisions of sec. 5 of an act to create a Federal Trade Commission, approved Sept. 26, 1914 (38 Stat. 717), in using an unfair method of competition against the Basket Stores Company, a corporation organized under the laws of Nebraska. Although the charge made against petitioner was with reference to said Basket Stores Co., the order above set forth is as broad as the business world, and in any event would have to be modified if it were to be sustained in any particular. The order, however, was made pursuant to findings of fact made by the commission which are as follows:

"(1) Respondent is a corporation organized under and existing by virtue of the laws of the State of Nebraska. Its principal place of business is at Lincoln, Nebraska. Respondent's business is that of a wholesale grocer, buying groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the State of Nebraska to the warehouse of the respondent at Lincoln, Nebraska, and are resold and transported to customers in and beyond the State of Nebraska. The business operations of the respondent include sales and deliveries in Nebraska, Colorado, Kansas, Wyoming, South Dakota, and Montana, and its annual volume of business is approximately $2,500,000.00. In the conduct of its business the respondent is in competition, among others, with the Basket Stores Company.

"(2) The Basket Stores Company is a corporation organized under and existing by virtue of the laws of the State of Nebraska. Its principal place of business is at Omaha, Nebraska. The Basket Stores Company conducts two lines of business—one, that of a wholesale grocer, and that of retail selling through a chain or organization of retail stores. As a wholesale grocer, the Basket Stores Company maintains a warehouse at Omaha and a branch warehouse at Lincoln, Nebraska. It buys groceries, provisions, and the like

commodities in wholesale quantities from the manufacturers
151 thereof throughout the United States, which commodities are transported from points outside the State of Nebraska to the warehouses of the Basket Stores Company at Omaha and Lincoln, Nebraska, and are resold in part and transported to customers within and outside the State of Nebraska. This part of the Basket Stores Company's business is about ten per cent of the total. The Basket Stores Company was licensed as a wholesale grocery house by the U. S. Food Administration, which fact was known to the respondent. The Basket Stores Company also operates a series or chain of retail stores, seventy-two in number, four of which are in Iowa, the remainder being located in Nebraska. There are, at this time, eighteen stores operated by the Basket Stores Company in Lincoln. The groceries, provisions, and like commodities distributed through these stores were supplied from the Basket Stores Company's warehouses. About ninety per cent of the company's business was done through these retail stores. The total annual volume of the Basket Stores Company's business is approximately $2,500,000.00.

"(3) In the month of September, 1918, a representative of F. A. Snider Preserve Company solicited from the Basket Stores Company's officials, at its head office at Omaha, and obtained an order for commodities produced by the Snider Company, to be shipped to the warehouse of the Basket Stores Company at Lincoln. The Snider Company also secured orders from the respondent and other customers in neighboring communities. The commodities sold in and around Lincoln were placed by the Snider Company in one car, consigned to respondent at Lincoln, making up what is known as a "pool" car to get the benefit of the freight rate on a car lot shipment. The Snider Company sent to respondent a statement of the car contents, showing the various business houses for which certain specified goods were intended, the Basket Stores Company and its purchase from Snider Company being shown on this statement.

"(4) This pool car consigned to respondent reached Lincoln, Nebraska, on October 10, 1918, and was promptly unloaded and the contents distributed by respondents. Its own commodities were placed in its warehouse, the commodities belonging to business houses outside of Lincoln were reconsigned to them by local freight, and the other purchasers in Lincoln were notified of the arrival of
152 their goods and promptly obtained the same, except the Basket Stores Company. The commodities belonging to this company were stored in respondent's warehouse. The Basket Stores Company was not notified of the arrival of these goods in Lincoln or of their presence in respondent's warehouse, and no opportunity to obtain its goods was afforded the Basket Stores Company until November 15th, 1918, when respondent notified the Basket Stores Company of the presence of its property.

"(5) The Basket Stores Company was in need of these commodities for its trade, its stock of these goods was low and the delay in

receipt due to the actions and failure of the respondent to extend to the Basket Stores Company the same course of dealing that it used with all the other owners of commodities contained in the pool car was a hindrance and an obstruction to the Basket Stores Company in the conduct of its business in competition with the respondent and others in the wholesale trade and with its competitors in the retail trade.

"(6) On October 8, 1918, prior to the arrival of the pool car at Lincoln, the respondent having received the statement from F. A. Snider Preserve Company regarding the contents of the car and the distribution to be made thereof, in writing protested to the Snider Company against the sale direct to the Basket Stores Company, and asked for the allowance of the regular jobbers' profit on the sale, as though made through respondent. The Snider Company did not reply to this letter. Subsequent to the arrival of the car at Lincoln, the distribution of its contents to the owners thereof, except as to the Basket Stores Company, and while the goods purchased by that company were in respondents custody, respondent wrote the Snider Company on October 22, 1918, referring to the unanswered letter and asking what it was to charge the Snider Company for checking out, unloading, and reshipping the other jobbers' goods. It likewise wrote the Snider Company on the same day with reference to damage to goods in transit. In response to a request from the Snider Company for payment respondent wrote, on November 16, declining to make payment to the Snider Company for goods purchased from it by the respondent until reply was made by the Snider Company to respondent's letters (of October 8 and 22) and until allowance was made respondent for the jobbers' commission
153 on the sale to the Basket Stores Company. The Snider Company suggested that respondent remit, taking credit for amounts claimed, and explaining fully the reasons therefor. The respondent complied, deducting, among other amounts, the sum of $100.00 as commission on the sale to the Basket Stores Company. This deduction, among others, the Snider Company refused to allow, and returned the remittance. Whereupon, on December 16, respondent wrote the Snider Company, insisting upon the allowance of this commission, protesting against the action of the Snider Company in selling direct to the Basket Stores Company, and threatening the Snider Company with the cessation of respondent's business and return of all the goods produced by the Snider Company then in respondent's stock, if this commission were not allowed and the Snider Company continued direct sales to the Basket Stores Company.

"(7) Early in January following, the Snider Company sent a representative to Lincoln, who interviewed the president of the respondent in an attempt to obtain a settlement of the controversy, which was not successful. The respondent, in accordance with the statements in its letter of December 16, ceased to purchase from the Snider Company."

The commission concluded from the above findings of fact that the conduct of petitioner unduly hindered competition between the Basket Stores Co. and others similarly engaged in business, and that the intent and purpose of the petitioner was to press the F. A. Snider Co. to a selection of customers in restraint of its trade and to restrict the Basket Stores Co. in the purchase of commodities in competition with other buyers. We are of the opinion that the findings of the commission do not show petitioner to have been guilty of an unfair method of competition so far as the Basket Stores Co. is concerned, or others similarly engaged in business. There is no finding that petitioner combined with any other person or corporation for the purpose of affecting the trade of the Basket Stores Co. or others similarly engaged in business. So far as petitioner itself is concerned it had the positive and lawful right to select any particular merchandise which it wished to purchase and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it or for no reason at all. It had a right to announce its
154 reason without fear of subjecting itself to liability of any kind.

It also had the unquestioned right to discontinue dealing with any manufacturer or in this particular instance with the F. A. Snider Preserve Co. for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right can not be charged against petitioner as an unfair method of competition. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290; U. S. v. Colgate & Co. 250 U. S. 300; Victor Talking Machine Co. v. Kemeny, 271 Fed. 810; Federal Trade Commission v. Gratz, 253 U. S. 421; Jergens v. Woodbury, 271 Fed. 43, 44; Cudahy Company v. Frey & Sons, 261 Fed. 65, 67; Union Pacific Coal Co. v. U. S., 173 Fed. 737; Dueber Watch-Case Co. v. Howard Watch & Clock Co., 66 Fed. 637, 644, 645; Western Sugar Refining Co. et al. v. Federal Trade Commission (Ninth Circuit, Oct. 10, 1921); Kinney-Rome Co. v. Federal Trade Commission (Seventh Cir. Sept. 8, 1921); Sinclair Refining Co. v. Federal Trade Commission, 273 Fed. 478; Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. 600; U. S. v. American Tobacco Co., 221 U. S. 106; Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48.

Being of the opinion that the facts found by the commission do not show an unfair method of competition by petitioner, its petition to revise is granted and the order of the commission is vacated and set aside.

Filed May 8, 1922.

155 DECREE.

This matter came on to be heard on the petition to review order of the Federal Trade Commission and transcript of proceedings before said commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the said petition be, and the same is hereby, granted, and that the order of said Federal Trade Commission entered on the 23rd day of February, A. D. 1921, in a proceeding commenced by the commission against the petitioner herein for the alleged violation of the provisions of section 5 of an act to create a Federal Trade Commission, approved September 26, 1914, be, and the same is hereby, vacated and set aside; and that a procedendo herein be issued to the said commission so that proceedings may be had in this matter in conformity with the opinion and decree of this court.

It is further ordered by this court that no costs be taxed in this court in favor of either of the parties to this proceeding.

May 8, 1922.

156 CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the petition to review an order of the Federal Trade Commission and of the transcript of proceedings before said Federal Trade Commission, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of the record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Raymond Bros.-Clark Company was petitioner and the Federal Trade Commission was respondent, No. 216, Original, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fourth day of June, A. D. 1922, a procedendo was issued out of said Circuit Court of Appeals in said cause, directed to the Federal Trade Commission.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-second day of July, A. D. 1922.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

157 STIPULATION AS TO RETURN TO WRIT OF CERTIORARI.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record

now on file in the Supreme Court of the United States shall consti-
tute the return of the clerk of the United States Circuit Court of
Appeals for the Eighth Circuit to the writ of certiorari granted
therein.

JAMES M. BECK,
Solicitor General.
EMMET TINLEY,
Counsel for Respondent.

October 30, 1922.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No
216, Original. Raymond Bros.-Clark Company, petitioner, vs. Fed
eral Trade Commission. Stipulation as to return to writ of cer-
tiorari. Filed Nov. 28, 1922. E. E. Koch, clerk.

158 WRIT OF CERTIORARI.

(Filed Dec. 6, 1922.)

United States of America, ss:

The President of the United States of America, to the Honorable
the Judges of the United States Circuit Court of Appeals for the
Eighth Circuit, greeting:

Being informed that there is now pending before you a suit in
which Raymond Bros.-Clark Company is petitioner and Federal
Trade Commission is respondent, No. 216, Original, which suit was
removed into the said Circuit Court of Appeals by virtue of a peti-
tion to review an order of the Federal Trade Commission, and we
being willing for certain reasons that the said cause and the record
and proceedings therein should be certified by the said Circuit Court
of Appeals and removed into the Supreme Court of the United
159 States, do hereby command you that you send without delay
to the said Supreme Court, as aforesaid, the record and pro-
ceedings in said cause, so that the said Supreme Court may act
thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the
United States, the twenty-sixth day of October, in the year of our
Lord one thousand nine hundred and twenty-two.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

160 RETURN TO WRIT.

United States of America, Eighth Circuit, ss:

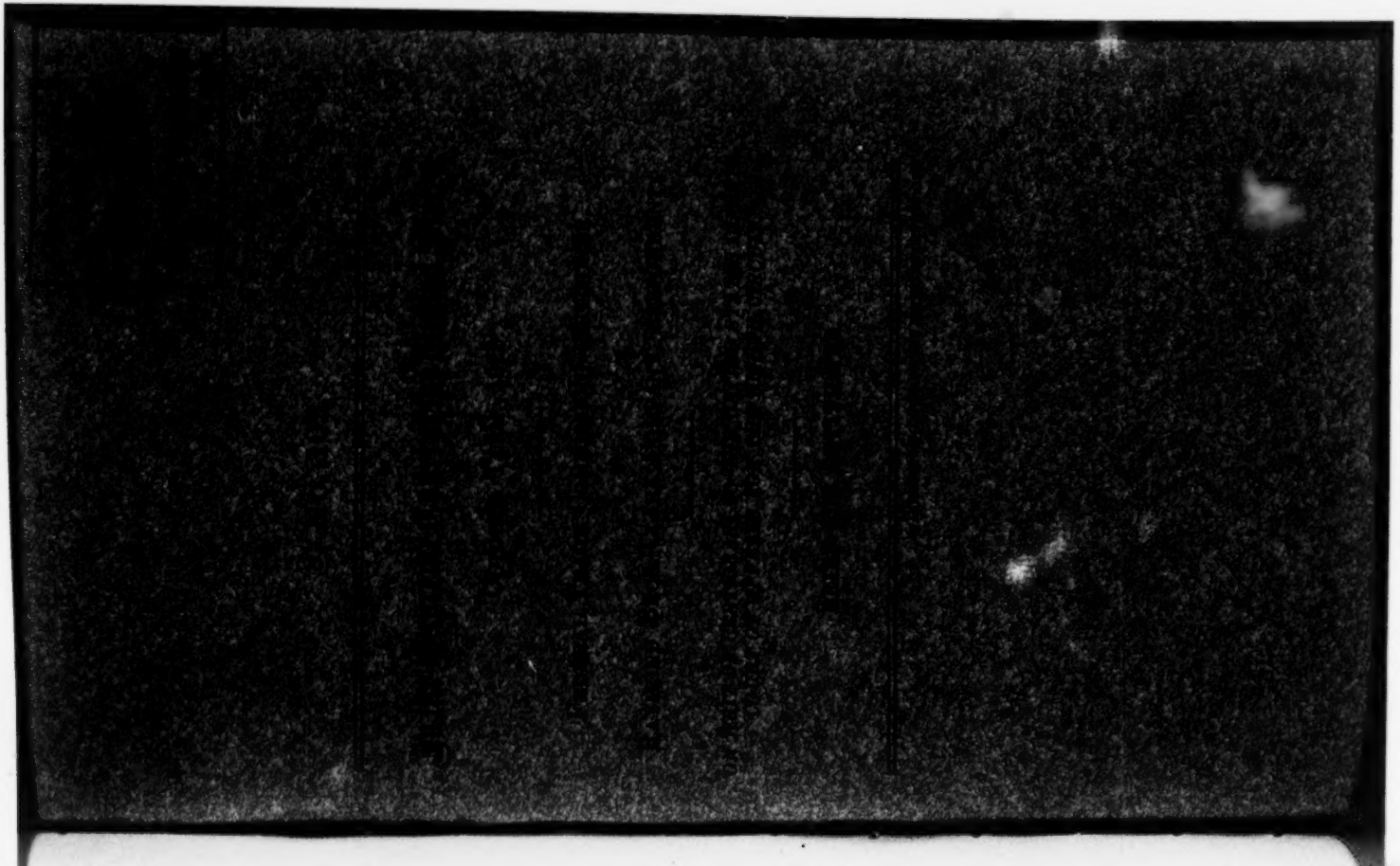
In obedience to the command of the within writ of certiorari
and in pursuance of the stipulation of the parties, a full, true, and
complete copy of which is hereto attached, I hereby certify that the

transcript of record furnished with the application for a writ of certiorari in the case of Raymond Bros.-Clark Company, petitioner, v. Federal Trade Commission, No. 216, Original, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-eighth day of November, A. D. 1922.

[SEAL.] E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals for the Eighth Circuit.

○



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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
RAYMOND BROS.-CLARK COMPANY, RESPONDENT. } No. 102.

BRIEF FOR PETITIONER.

STATEMENT.

This case comes to this court on a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, which set aside an order of the Federal Trade Commission directing the respondent to cease and desist from hindering or preventing anyone from the purchase of groceries, provisions, and like commodities, in the course of interstate commerce, direct from manufacturers or producers; or hindering or preventing any manufacturer or producer of or dealer in such commodities, in the course of such commerce, in or from the selection of customers; or influencing or attempting to influence any manufacturer, producer of, or dealer in such commodities, in the course of such commerce, not to accept as a customer anyone with whom such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

THE FACTS.

Preliminary Statement.

Speaking broadly, this is one of many controversies which have reached the Commission and the courts arising out of developments in the business world which appear to manifest an economic tendency toward a more direct system of distributing the products of factory and farm to the consumers thereof. The tendency has appeared in the establishment of cooperative organizations among dealers for purchasing directly from manufacturers, cooperative selling organizations among farmers, mail-order houses, chains of retail stores, etc. To the extent to which the movement is successful it apparently threatens the profits of those through whose hands the commodities have heretofore passed, and it has, therefore, from the first met the organized and individual opposition of established dealers, retail and wholesale. (*Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600; *National Harness Manufacturers' Association* v. *Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers' Assn. of El Paso, Texas, et al.* v. *Federal Trade Commission*, 277 Fed. 657.) The function of the Government has been confined to removing the artificial obstructions imposed upon interstate commerce as a result of efforts of the contending economic forces, leaving the movement to work itself out in an unrestricted market.

The instant case involves the efforts of a corporation operating a chain of retail grocery stores to purchase in wholesale quantities directly from manufacturers.

If a chain of retail stores can purchase its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores can sell commodities to the purchasing and consuming public at prices below those made by stores through which commodities are distributed from manufacturer, to wholesaler, to retailer. The public is entitled to any benefits which may be derived from a direct method of distribution by manufacturers or producers to retailers; and if a jobber should prevent a chain of retail stores from purchasing from manufacturers and coerce manufacturers from distributing their products direct to the retailer by threats of the withdrawal of patronage or by other similar means, it is submitted that such practices constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal Trade Commission Act. The manufacturer should be free to select either of these methods of distribution, or to employ both. The considerations which govern his decision in this matter will presumably be the relative profitableness of these different methods, and this, in turn, is affected chiefly by the volume of business obtainable by using one or the other, or employing both. It

may be urged by jobbers that the most economical method of distribution is through the wholesaler and the retailer to the consumer, but the assumptions lying back of this theory are not always sound. The actual facts are that this depends almost entirely upon a quantity position. It may be to the interest of the manufacturer in certain cases to sell through the wholesaler because of the size of the wholesaler's orders, because the sales effort required to sell a given volume of goods through the wholesaler is much less than that which must be made to sell the same volume direct to retailers, owing solely to the fact that the usual wholesale order is much larger than the usual order given by a retailer. But with the development of large-scale retailing, particularly the mail-order house, chain stores, and cooperative retail associations, the situation has changed, and the Basket Stores Co. was able to and did purchase its supplies in quantities fully as large as those in which wholesalers generally purchased their supplies, and as a result the Basket Stores Co., in the retail branch of its business, absorbed the profit formerly obtained by the wholesaler and was able to pass it along to the consuming public.

Transactions out of which this case arises.

The respondent is a corporation organized under the laws of the State of Nebraska and is engaged in the business generally known as that of a wholesale grocer, with its principal place of business at Lincoln, Nebr. Its business is extensive, the value of

its sales amounting in the aggregate to approximately $2,500,000 annually. (Rec. p. 90.)

The Basket Stores Co. is a corporation organized under the laws of the State of Nebraska and is engaged in the retail and wholesale grocery business. (Rec. p. 57.) At the time of and prior to the issuance of the Commission's complaint in this proceeding it had its principal place of business at Omaha, Nebr., and maintained a warehouse at Lincoln, Nebr., and had 72 retail stores at Omaha, Lincoln, and at other points in the States of Nebraska and Iowa. It purchased substantially all of its supplies direct from manufacturers in States other than Iowa in carload lots or in quantities equivalent to those in which wholesale grocers generally purchased their supplies. Of the commodities distributed by the Basket Stores Co. approximately 10 per cent of the total were sold to retail stores outside its own organization and to restaurants and hotels in wholesale quantities, and approximately 90 per cent of the total of such commodities were sold to the consuming public through the retail stores operated by it. (Rec. p. 58.)

On October 4, 1918, there was shipped from Marion, Ind., by the T. A. Snider Preserve Co. a carload of food products, orders for which had been taken from six customers located at Lincoln, Nebr., and adjacent points. (Rec. p. 27.) That part of the shipment sold to the Basket Stores Co. weighed only 16,251 pounds (Rec. p. 94), or less than the minimum carload, and by combining these goods

with those purchased by the five other customers the aggregate weight was over 61,000 pounds, or more than a minimum carload, which gave the consignees the benefit of the carload freight rate, which is substantially less than the rate would have been for a shipment of less than a carload. As was the custom in such cases, the goods were shipped in what is known as a "pool" car, which was consigned to respondent, and the invoice of the contents of the car was sent to respondent, showing the items purchased by each of the six customers. Of the six consignees five were members of the Iowa-Nebraska Wholesale Grocers' Association, concerning whose right to purchase in wholesale quantities direct from manufacturers respondent made no contention; but when it ascertained that a portion of the goods, more than 26 per cent of the total weight, was consigned to the Basket Stores Co. it immediately protested to the Snider Co. in a letter dated October 8, 1918, and expressed surprise that the goods had been sold to the Basket Stores Co. direct; and the claim was made that the Basket Stores Co. was nothing but a retail store, and a demand was made for a credit slip for the regular jobber's profit on the goods sold to the Basket Stores Co. (Rec. p. 49.) No response was made by the Snider Co. to this demand, and on October 22 two letters were written to the Snider Co. by respondent requesting advice as to the amount it should charge for unloading, checking out, and reshipping the contents of the car, and advising the Snider Co. of the distribution

of the contents of the car, some of which had been received in bad order and was turned back to the railroad company.

The car reached Lincoln, Nebr., on October 10, 1918 (Rec. p. 48), and was "spotted" at the warehouse of the respondent the next day, and some time between October 11 and October 16 the car was unloaded and that portion of the goods going to Beatrice and Nebraska City had been reshipped to these points and the goods which had arrived in bad order were turned back to the railroad company (Rec. p. 88), but the Basket Stores Co. was not notified of the arrival of the goods until November 15 following, or 35 days after the car had been "spotted." The goods consigned to the Basket Stores Co. remained all this time in the warehouse of respondent (Rec. p. 89), although the Basket Stores Co. was greatly in need of the goods to supply its trade (Rec. p. 22). In remitting to the Snider Co. for the goods purchased by it, respondent deducted from the amount of the bill $100 which it designated as "Commission on Basket Stores." (Rec. p. 53.) A controversy arose over this charge between the Snider Co. and the respondent, and on December 16 following respondent wrote to Snider Co. again, in which letter it sought to justify its action in deducting the $100, and reiterated its claim that the Basket Stores Co. did only a retail business and did not operate a wholesale store, and the statement was made that if respondent had known that the Snider Co. had accepted an order

from the Basket Stores Co. direct, the Snider Co. would never have had a dollar's worth of business from respondent, and that, unless its claim for $100 commission on the Basket Stores Co. shipment were allowed, it desired the Snider Co. to give it shipping instructions for all Snider Co. products in the possession of respondent. (Rec. p. 53.) In January, 1919, Mr. T. A. Davis, sales manager for the Snider Co., called on respondent to end, if possible, the controversy which had arisen over the $100 commission, but did not succeed. (Rec. p. 29.)

The Commission's findings as to the facts are supported by evidence.

The Commission's findings as to the facts appear at pages 10 to 13 of the Record and contain all of the material facts of the case. In the court below counsel for the respondent did not question the accuracy of these findings, save in the following particulars:

(*a*) That respondent is a competitor of the Basket Stores Co. (Rec. p. 11);

(*b*) That one line of the business of the Basket Stores Co. is that of a wholesale grocer (Rec. p. 11);

(*c*) That the Basket Stores Co. was in need of the commodities, the delivery of which was delayed by respondent (Rec. p. 12);

(*d*) That respondent protested to the Snider Co. against the sale by it of commodities direct to the Basket Stores Co. (Rec. p. 12); and

(*e*) That respondent ceased to purchase commodities from the Snider Co. (Rec. p. 13).

It is submitted that the testimony of the witness Williams (Rec. p. 58) conclusively shows that in the purchase of supplies it competes with all grocers at Omaha and Lincoln, and that in the sale and distribution of commodities to the extent of 10 per cent of its total volume of business it competes with wholesale grocers, including respondent.

The testimony of the witness King (Rec. p. 22) conclusively shows that the Basket Stores Co. was in need of the goods and was seriously inconvenienced by the failure of respondent to notify them of the arrival of the goods in Lincoln. However, this is not a material point; the Basket Stores Co. had ordered the goods and had paid for them, and it would be absurd to assume that they did not need the goods; but whether they were in immediate need of them or not, they were entitled to have notice of their arrival in Lincoln.

The letters comprising Comm. Ex. 4, 7, and 11 (Rec. pp. 49, 51, and 53) were properly characterized by the Commission as a protest in writing. The letters speak for themselves and undoubtedly any disinterested critic would regard them as containing a protest.

The testimony of the witness Davis (Rec. p. 55) and that of the witness Raymond (Rec. p. 86) is to the effect that no more goods were bought from the Snider Co. after the letters, Exhibits 4, 7, and 11, were sent to the Snider Co.

It is therefore impossible to establish that any portion of the numerous findings by the Commission was not supported by testimony.

Holding of the court below.

The court below held, on these facts, that the respondent had merely exercised its lawful right to select the merchandise it wished to purchase and the persons and corporations from whom it wished to purchase; and any incidental result therefrom injurious to others could not be charged as an unfair method of competition. (Rec. p. 134.)

The questions presented.

The petitioner contends that the court below misconceived the issues in the case, and that the real questions presented are, not whether the incidental injury resulting from a cessation of business relations between the respondent and the Snider Co. is an unfair method of competition, but—

1. Whether a trader may obstruct the due course of interstate commerce by threats of withdrawal of patronage, or by other means, and thereby prevent competitors from purchasing in interstate commerce commodities necessary or desirable for the continuance of their business;

2. Whether a trader, acting alone and not in combination with others, may prevent, or attempt to prevent, competitors or other traders from securing goods by coercing or inducing, or attempting to coerce or induce, manufacturers or producers, through

threats of withdrawal of patronage, or by other means, not to sell goods to such competitors;

3. Whether a trader, acting alone and not in combination with others, may, by threats of withdrawal of patronage, or by other means, coerce or induce, or attempt to coerce or induce, a manufacturer or producer in the selection of customers in interstate commerce;

4. Whether a trader, acting alone and not in combination with others, may, by threats of withdrawal of patronage, or by other means, disrupt the relation of buyer and seller existing between competitors or traders and manufacturers or producers, and prevent the manufacturer or producer from continuing to sell to such traders.

ARGUMENT.

The decision of this court in the *Gratz case* (253 U. S. 421) interpreted the substantive law of the Trade Commission Act as creating two classes of practices which are unfair within the meaning of the statute, first, those which are contrary to good morals because characterized by deception, bad faith, fraud, or oppression, and, second, those which have a dangerous tendency unduly to hinder competition. Subsequently, in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), this court held the "Beech-Nut System of Merchandising" to be an unfair method of competition because of its effect to restrict competition. Again, in *Federal Trade Commission* v. *Winsted Hosiery Co.* (258 U. S. 483),

the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the method being its deceptive character. These decisions firmly establish the criteria for the interpretation of the Act.

In the instant case the petitioner contends that the practice attacked falls within both of the classes of practices declared by this court to violate the Act: (1) Because it imposes a burden upon interstate commerce and has a dangerous tendency unduly to hinder competition; (2) because of its oppressive character; (3) because of its unlawful character when tested by common law criteria, which it appears are to be applied in the construction of the Trade Commission Act.

This proceeding involves "involuntary" restraints of trade; and control of the market by respondent need not be shown.

This court has repeatedly held that the restraints of trade prohibited by the Sherman law are of two classes—voluntary restraints of trade and involuntary restraints of trade. Voluntary restraints comprise principally those voluntary combinations, consolidations, or agreements which have the power to disturb the relation of supply to demand, and enhance prices by control of production or of the market. Involuntary restraints are denounced not because the offender controls or can control the market, but because he restricts the liberty of the trader to engage in business and destroys that equality of opportunity the preservation of which this court has declared to be one of the primary

objects of that statute. (*U. S.* v. *Patten*, 226 U. S. 525, 541; *Loewe* v. *Lawlor*, 208 U. S. 274, 293–294; *U. S.* v. *Keystone Watch Case Co.*, 218 Fed. 502; *Steers* v. *United States*, 192 Fed. 1.)

Applying this interpretation of the Sherman Law to the Trade Commission Act, the second class of practices held in the Gratz case to be prohibited by the statute—those having a dangerous tendency unduly to hinder competition—is to be construed as embracing practices which either impose those voluntary restraints which may control the market, or those which restrict the liberty of the citizen to engage in commerce. Indeed, both the history of the development of the laws affecting restraint of trade and the wording of the Federal Trade Commission Act—unfair methods of competition—indicate that the primary purpose was to reach those methods designed to restrict the competitive effort of others, rather than those intended to control the market, though both classes of practices were undoubtedly intended to be included within the operation of the Act.

The instant case involves the legality of practices designed to restrain the liberty of others to engage in commerce.

The practice burdens interstate commerce, hinders competition, and destroys that equality of opportunity to compete which it was the purpose of the Trade Commission Act to preserve.

It is well established under the Sherman Law that the circulation among members of an association of retail dealers of the names of wholesalers engaged

in interstate commerce selling direct to consumers, with the obvious purpose of having such retail dealers refrain from dealing with the wholesalers whose names appear on the list, constitutes an unwarranted obstruction and interference with interstate commerce. (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600.)

Referring to the decision in the *Eastern States case*, this court, in *Duplex Printing Press Company* v. *Deering* (254 U. S. 443, 467), says:

> In *Eastern States Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600) wholesale dealers were subjected to coercion merely through the circulation among retailers who were members of the association of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe* (235 U. S. 522, 534): "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."
>
> It is settled by these decisions that such a restraint produced by peaceable persuasion is

> as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Under the Trade Commission Act the interference with interstate commerce is unlawful, whether the method is employed by one or by many. No contract, combination, or conspiracy need be present, as in proceedings under the Antitrust Act, but a method which has the prohibited result, i. e., dangerous tendency unduly to hinder competition, is unlawful if employed by any person, partnership, or corporation.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Co., and that for the direct purpose of destroying such interstate traffic petitioner sought to induce the Snider Co. to cease selling its products to the Basket Stores Co. Obviously, if respondent's efforts had been successful, there would have been no more sales by the Snider Co. to the Basket Stores Co., and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Co. would have been restrained. (See *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38.)

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Methods employed oppressive within the Gratz decision.

The method used by the petitioner not only is calculated to hinder competition and therefore falls within the second class of practices condemned by the statute, but also is characterized by oppression as that term is used in the decision in the Gratz case. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

Such methods destroy that equality of opportunity to compete in business which it was the great purpose of the Trade Commission Act and of cognate statutes to preserve. (*U. S.* v. *American Linseed Oil Co.*, decided June 4, 1923; *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 323; *U. S.* v. *International Harvester Co.*, 214 Fed. 987.)

This court has held in several decisions that traders should have large freedom of action in the conduct of their own affairs. (*Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568;

Federal Trade Commission v. *Sinclair Refining Co.*, decided April 9, 1923.) It has not held that they should be permitted to coerce the conduct of others, but on the contrary has clearly indicated the line which separates fair competition from that which is unfair. In *Hitchman Coal & Coke Co.* v. *Mitchell* (245 U. S. 229) this court said:

> Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were, their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Again, in *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta* (decided by this court June 11, 1923), the court indicates the character of that fair competition which the law favors and the opposite of which it condemns. It says:

> Country banks are not entitled to protection against legitimate competition. Their loss here shown is of the kind to which business concerns are commonly subjected when improved facilities are introduced by others, or a more efficient competitor enters the field.

Goods are as necessary to the conduct of business as are employees. This is not a case of the employment of superior facilities or efficiency, but of an attempt to destroy a competitor by coercing manufacturers or producers, through fear of loss of patronage, not to sell to him. Such methods have no relation to the conduct of the respondent's business, but constitute a direct attempt to restrict the competition of others.

If the method is unfair, because calculated to have the consequences set forth, it is no defense that the record does not disclose that such consequences have already resulted from its use.

In the *Sears-Roebuck case* (258 Fed. 307) the Court of Appeals for the Seventh Circuit says:

> The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriæ, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases.

Similarly, in the *National Harness Manufacturers case* (268 Fed. 705), the court says:

> In view of what has appeared, the criticism of lack of public injury is without force.

The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores' right at common law to a free market.

It is submitted that on principle the conduct of the respondent constituted an unlawful interference at common law with the right of the Basket Stores Co. to enter the business of a wholesale and retail dealer and to have business relations with any and all persons willing to deal with it. In a long line of decisions it has been held that business men may not combine to prevent others from having business relations with whom they will. In many cases, however, the element of combination or concerted action is not the ground of the decision. In civil cases involving conspiracy, the gist of the action is in most jurisdictions held to be the damage resulting from unlawful acts and not the conspiracy itself, and it has sometimes been expressly held that the means employed to prevent persons from purchasing or selling goods were in themselves actionable.

Martell v. *White* (185 Mass. 255) was an action in tort based upon an alleged conspiracy to injure the plaintiff in his business. The defendants were members of a voluntary association of manufacturers, quarriers, and polishers of granite, one of the by-laws of which association provided that any member having business transactions with any party or concern not a member thereof, and in any way

relating to the cutting, quarrying, polishing, buying, or selling of granite, should for each such transaction contribute at least $1 and not more than $500 to the support of the association. The plaintiff in that case was a quarrier of granite and had enjoyed a large business with some of the members of the association. As a result of fines ranging from $10 to $100 imposed on such members for dealing with him, the plaintiff's business was practically destroyed. Passing the question of the legality of the objects of the association and *considering the means employed to effectuate its objects*, the court held that to compel members of the association to refrain from dealing with the plaintiff by means of fines was unlawful and not justified by competition, saying in part:

> In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural

> or logical relation to the grounds upon which the right to compete is based. * * *
>
> In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

In *Brown & Allen* v. *Jacobs Pharmacy Company*, 115 Ga. 429 (1902), it was held that an association of retail druggists which sought to prevent any druggist who did not maintain prices from securing supplies, was unlawful and that an injunction would lie at the instance of a dealer whose purchases of drugs from wholesalers were sought to be prevented, restraining the members of the association, among other things, from "in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter, and from conspiring and from seeking to prevent wholesalers or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff."

In the course of the opinion the court summarized several decisions relied on as follows:

> In *Reg.* v. *Druitt* (10 Cox Cr. Cas. 593) it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. * * * In *Olive* v. *Van Patten* (1894) (7 Texas Civ. App. 630), where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff—a sawmill owner and dealer who was not a member—to join such association and his exercising the right to sell to others than dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury, it was held to state a good cause of action for damages and injunction. * * *
>
> In *Jackson* v. *Stanfield* (1894) (137 Ind. 592) it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or lose the business of

> the members of such combination, was unlawful, and rendered a member who procured action by the association to the injury of brokers liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person.

In some of the cases cited by the court in the *Brown & Allen case, supra*, the element of combination was involved in the decision, while in others the ratio decedendi is not very clear. In this line of cases as a whole, however, there is constant reference to the right of the plaintiff to conduct his business free from the interference of others. The definition of this right and the duty of others not to invade it is not to be found in many of the decisions. But in *Booth & Bro.* v. *Burgess* (72 N. J. Eq. 181), Vice Chancellor Stevenson, brushing aside all questions of combination, of malicious injury, of the wrongful or unlawful character of the particular means, and of the limits of the justification of self-interest, harks back to the basic principle of all tort actions and seeks to ascertain what right of the plaintiff has been invaded and what is the correlative duty of the defendant. He concludes that in such cases the right of the plaintiff is "the right to a free market." The court says in part:

> The primary legal right, which it seems to me should be recognized as belonging to the complainant in the case, may be defined or described as the *right to a free market.* * * *

> We have the right to a free market, which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect. Thus recognition is accorded to the "interest which one man has in the freedom of another." (*Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759.)
>
> The tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of *freedom* to deal with him on the part of all who may voluntarily desire to deal with him. * * *
>
> A fourth right, or a wide extension of the right above defined, as the right to a free market, has undoubtedly been involved in if not expressly recognized by the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a free market but a market where transactions occur naturally according to the ordinary laws of trade and commerce, unaffected not only by coercion but also by persuasions or noncoercive inducements from outside parties applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage.

Whether this right to a free market be invaded by one or by many, it is equally actionable. In *Booth & Bro.* v. *Burgess*, *supra*, the court points to Lord Lindley's expression in *Quinn* v. *Leathem*, A. C. (1901) 495, 534:

> One man exercising the same control over others, as these defendants do, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong toward the plaintiff for which the plaintiff could have maintained an action.

Respecting the wrongful character of the invasion of one's right to a free market by a single individual, Sir Frederick Pollock, in his "The Law of Torts" (Tenth edition, p. 163), says:

> And since a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so (Lord Lindley in *Quinn* v. *Leathem*), it follows that coercing a man's workmen or customers not to work for or deal with him (as distinguished from refusing to deal with him one's self) is not an exercise of one's own right but a violation of his and actionable if willfully done to his damage. Such a thing is more likely to be done, and likely to be more injurious if done by several persons than by one, but on principle it would seem immaterial if there be one wrongdoer or several.

An expression from a decision by the Court of Appeals of the State of New York in a recent case (*Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1 (1919),) appears to be clearly in accord with the *Burgess case, supra*, and with the opinion expressed by Pollock in the excerpt quoted. The New York court said:

> But there is an important and perceptible distinction, in the realms of justice, civil order,

> and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion, or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop, and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he can not lawfully prevent, through fraud or other form of dishonesty, or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he can not lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would did he intentionally disable the other or his industrial resources.

(See also *People* v. *Butler*, 192 N. W. 685.)

In the instant case the Basket Stores Co. had the right at common law to purchase from and to sell to all persons who were willing to have business relations with it, and had the further right to have all persons willing to trade with it left free to do so.

The fact that it combined the business of wholesaling and retailing was not a novelty and was not unlawful, as was held by the Circuit Court of Appeals for the Fifth Circuit in the case of *Wholesale Grocers Association of El Paso, Texas, et al.* v. *Federal Trade Commission* (277 Fed. 657 at 664). When the respondent sought to compel or coerce the Snider Co. not to sell to the Basket Stores Co. and demanded a commission for itself or for some other wholesaler on sales by the Snider Co. to the Basket Stores Co., it invaded the Basket Stores Co.'s legal right to a free and uncoerced market. Its refusal to purchase from the Snider Co. if it continued relations with the Basket Stores Co., coupled with the demand that in the event the Snider Co. continued such relations it should take back from the respondent all goods of its manufacture in its warehouses, was a further effort to coerce the Snider Co. to refrain from business relations with the Basket Stores Co. and was an actionable wrong against the latter company. It matters not whether the effort to prevent the Basket Stores Co. from purchasing as it saw fit was carried out by the respondent alone or in association or collusion with others, it was equally a violation of the Basket Stores Co.'s legal rights and of the right of the public to have the benefit of the competitive prices of the Basket Stores Co. based on purchases of that company in an open and free market.

The purpose of the Trade Commission Act was to insure to all business men and to the public the con-

tinuance of free and fair competition in a free and open market. The effort to prevent the Basket Stores Co. from purchasing the subjects of commerce was coercive in its character and clearly oppressive and illegal.

No question of respondent's right to refuse to deal with others involved in this case.

The foregoing decisions and excerpts therefrom demonstrate the difference between the right of a dealer to exercise his discretion with respect to those with whom he will deal, and his right to interfere with the exercise of a similar privilege in others. The question in the instant case is as to the respondent's right to prevent the Basket Stores Co. from purchasing from others willing to sell to it. Confusion is introduced into these cases by the assumption that because a man may decline to have business relations with a person, he may refuse to sell him save on a condition which destroys the freedom of third parties to an open market. Threats to withdraw patronage unless the buyer will cease selling to third parties accomplish, by the coercive effect of the fear of loss of patronage, the same result which would be accomplished by a contract of sale upon the express condition that designated parties would not be dealt with.

There was an illegal interference with established business relations.

The Basket Stores Co., having established business relations with the Snider Co. satisfactory to both parties, had a legal right to have that relation re-

spected by others, although the continuance of the relation was not secured by contract. In *Truax* v. *Raich* (239 U. S. 33, 38), this court says:

> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will.

Again, in *Hitchman Coal & Coke Co.* v. *Mitchell et al.* (245 U. S. 229, 252):

> In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers, although they are under no obligation to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint it will be able to retain

> them in its employ and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great and is recognized by the law in a variety of relations.
>
> See also *International News Service* v. *The Associated Press* (248 U. S. 215, 236) and *American Bank & Trust Co.* v. *Federal Reserve Bank* (256 U. S. 350).

The law of competition affords no sufficient justification for acts of interference of the character here involved. (*Martell* v. *White, supra, Hitchman Coal & Coke Co.* v. *Mitchell, supra,* [illegible] cases cited in that decision.)

In the *Gratz case* this court held that practices contrary to good morals, because characterized by deception, bad faith, fraud, or oppression, were within the prohibition of the statute. These are common-law criteria of interpretation. By parity of reasoning competitive methods which are by common-law tests actionable wrongs are also prohibited. It is inconceivable that Congress, when seeking to purge interstate commerce of unfair methods, did not intend to include within its prohibition tortious or otherwise unlawful methods. Not that all unlawful acts are unfair methods of competition, but that competitive acts immediately connected with interstate commerce which are contrary to established principles of lawful competition are also within the prohibition of the statute.

The practice being inherently illegal, no tendency to monopoly need be proven.

The foregoing establishes, we believe, the inherently illegal and oppressive character of the practices involved. Where this is established, it is not incumbent upon the Commission to establish also that the method has been pursued until, as a consequence, monopoly is threatened. The baneful effects of the practice, if its use be persisted in, have been mentioned elsewhere, and if they have not been they appear from a moment's consideration. If this court sustains the court below and places the stamp of its approval upon the practice, it may be employed with impunity not only by this respondent, but by all who desire to use it.

It would appear from the character of the Trade Commission Act that proceedings by the Commission were not intended by the Congress to be punitive, but preventive—to establish rather the legality or illegality of particular methods for guidance in the future than the guilt or innocence of particular parties.

> Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question; and that the action of the Commission is to be taken rather as a general illustration of the better methods required for the future than a specific selec-

> tion of petitioner for reproof on account of its conduct in the past. (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307.)

Public Interest.

Respondent urged in the Court below that the case was devoid of public interest and for this reason the Commission's order should be set aside.

To this the petitioner replies that the determination of the existence of public interest has been committed by the statute to the Commission as a matter preliminary to the issuance of a complaint and moving it to action or nonaction.

The Federal Trade Commission Act, in so far as it relates to the existence of public interest, is as follows:

> * * * And if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * * (38 Stat. 719, sec. 5.)

The words "if it shall appear to the Commission" clearly confer upon that body the function of determining when a complaint shall issue. The primary purpose of the provision was to vest in the Commission that discretion with respect to whether it would institute a proceeding in a given set of circumstances which would relieve it of the duty of proceeding in every instance of the use of unfair methods of competition. But for this discretionary power, mandamus would probably lie to compel the Commission

to hear and determine any case of the alleged use of unfair methods of competition (*Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474) however slightly the matter touched the general public. If the Commission should in a given case erroneously determine after hearing that methods of competition are prohibited by the Act, this Court would set aside the order based upon such determination. But if the Court find in a given case that the methods of competition are unfair within the meaning of the Act, it is submitted that it will not set aside the Commission's order on the ground that it should not have heard the matter.

There is ample public interest surrounding the use of the methods of competition involved in the instant case. The right of dealers engaged in interstate commerce to use the methods prohibited by the Commission's order to prevent others from engaging in interstate commerce is to be determined.

It is submitted that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and the case remanded with instructions to affirm the Commission's order.

JAMES M. BECK,
Solicitor General.
W. H. FULLER,
Chief Counsel, Federal Trade Commission.
ADRIEN F. BUSICK,
Attorneys for Federal Trade Commission.

○

No. [redacted]102

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,

VS.

RAYMOND BROS. CLARK COMPANY.

BRIEF OF RESPONDENT.

EMMET TINLEY,
W. E. MITCHELL,
D. L. ROSS,
EDWIN D. MITCHELL,
Counsel for Raymond Bros. Clark Company, Respondent.

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No. 535.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,

VS.

RAYMOND BROS. CLARK COMPANY.

STATEMENT OF CASE.

The respondent, deeming the statement of facts presented by the petitioner to be incomplete and to incorrectly reflect the record, desires to controvert the same.

On the 5th day of January, 1920, the Federal Trade Commission complained of Raymond Bros. Clark Company, under the provisions of Section 5 of the Federal Trade Commission Act.

The complaint alleges the making of preliminary investigations by the Commission and the belief, upon its part, that the respondent Raymond Bros. Clark Company had engaged in business practices (Rec. 5) constituting unfair methods of competition, in violation of Section 5 of the Act of Congress referred to. The

allegations of the complaint base the charge of unlawful practices upon a single business transaction. The respondent is alleged to be a wholesale grocer and engaged in business in the city of Lincoln, Nebraska, and the business transaction alleged to constitute unfair competition, charges a resulting injury to Basket Stores Company and to T. A. Snider Preserve Company. The Basket Stores Company was a corporation with its principal place of business in the City of Omaha and maintaining branch stores in the City of Lincoln and elsewhere for the sale of groceries to consumers.

The complaint sets forth the following as the specific acts constituting unfair methods of competition:

In September, 1918, T. A. Snider Preserve Company shipped a car load of its products from Marion, Indiana to Lincoln, Nebraska, consigned to this respondent. This car included products sold to and intended for delivery to Basket Stores Company as well as products sold to and intended for respondent and others. When this car of merchandise arrived respondent declined to deliver the products intended for delivery to Basket Stores Company unless T. A. Snider Preserve Company would pay respondent one hundred ($100.00) dollars as a jobber's profit. The complaint then makes the following charges:

(a) That respondent, at divers times, attempted to coerce T. A. Snider Preserve Company to refuse to recognize the Basket Stores Company as a jobber; to refuse to sell its products to Basket Stores Company at prices regularly charged recognized jobbers.

(b) That respondent, at divers times, represented that the Basket Stores Company was not a legitimate jobber but was engaged in the retail grocery business.

(c) The respondent, at divers times since September, 1918, threatened to withdraw its patronage from said T. A. Snider Preserve Company if said company sold to or recognized the Basket Stores Company as a jobber and refused to pay respondent the one hundred ($100.00) dollars demanded.

The complaint alleges that the effect of the acts and practices charged to have been engaged in by the respondent was to stifle competition and to interfere with the Basket Stores Company and T. A. Snider Preserve Company in trading with each other.

This complaint was regularly answered by the respondent admitting the corporate capacity of all parties involved and that the products manufactured by T. A. Snider Preserve Company moved in inter-state commerce as alleged. The answer, by a course of specific and general denials, puts in issue all of the other matters alleged in the complaint.

The answer after specifically denying that the Basket Stores Company is in competition with respondent affirmatively alleges that respondent was engaged in the operation of a wholesale grocery establishment, confining its sales to retail groceries for re-sale to consumers while the Basket Stores Company is engaged in the operation of retail stores in direct competition with the customers of respondent. The respondent further alleges that it could not, in fact, purchase the products of T. A.

Snider Preserve Company for re-sale to retailers so long as T. A. Snider Preserve Company was engaged in selling its products direct to the retail trade at the same price it was selling its products to the wholesaler.

The respondent admits in its answer that it told the T. A. Snider Preserve Company that it would not purchase its products if it sold the same to the Basket Stores Company and that it could not handle such products for resale to retailers who must sell the same in competition with the retail stores of the Basket Stores Company. The respondent also admitted in its answer that it demanded from the T. A. Snider Preserve Company the sum of one hundred ($100.00) dollars as compensation for its service in delivering the products consigned to it by T. A. Snider Preserve Company and intended for the Basket Stores Company. The answer alleges that the controversy is a purely local one and of it the Federal Trade Commission does not have jurisdiction.

The evidence upon the hearing presents a rather short story and is free from serious contradictions. The Basket Stores Company is a corporation organized under the laws of the State of Nebraska and engaged in the operation of retail grocery stores. It maintains a warehouse in the City of Omaha for the purpose of gathering together merchandise in sufficient quantities to supply its various establishments. The company, at the time involved in this controversy, was engaged in operating 72 retail grocery stores (Rec. 58). Of these stores 26 were located in Omaha and 17 in Lincoln (Rec. 61). In order to supply these retail grocery stores with merchan-

dise the company purchased largely from manufacturers and producers but found it necessary to purchase 34.57% of its total requirements from wholesale grocery establishments in the cities of Omaha and Lincoln during the year 1918 (Rec. 60). The Basket Stores Company purchased large quantities of butter, eggs and other farm products at its various country stores and the produce so acquired was sold by it to different jobbers and other retailers. This is the common practice engaged in by all retail stores in the central west (Rec. 63). The proportion of the business of the Basket Stores Company, comprising sales to jobbers and other retail establishments and which included a disposition of butter, eggs, poultry and farm produce will not exceed ten per cent of its total business. The total business for the year 1918 aggregated two and a half million dollars.

A retail grocer, as defined by the record of this case, is one who generally sells direct to consumers and a wholesaler is one whose general practice is not to sell direct to consumers but is to sell generally to retailers (Rec. 42). The advertisements of the Basket Stores Company openly declare its purpose and plan to cut out all middlemen (Resp. Ex. 2, 9, 12, 21 and 31).

In Exhibit 31 (Rec. 125) the Basket Stores Company, in published announcement, proclaims its purpose to engage in the operation of a retail grocery store in competition with the independent retailers who patronize the wholesale grocers.

> "W. D. Williams here tells something of the future plans of the Basket Stores Co.: The cash

and carry plan, to my mind, is the coming method of distribution. What we propose to do is to bring the producer just as close as possible to the consumer.

During this High-Cost-Of-Living time, which apparently is here to stay until the allies win the war, we are going to open many more stores for the convenience of the buying public.

* * * * * * * *

Ten years ago, we had but one store—today we are operating forty-four stores in Omaha, Lincoln, Council Bluffs and surrounding territory. Our business has grown from a one-store volume of $12,000 to forty-four stores doing a business of $2,143,093.00 in 1917.

The ordinary grocery store has the following expenses: Delivery cost 20 per cent; charge accounts, bad debts, collections and bookkeeping, 10 per cent. The Cash-and-Carry plan saves you all of this expense.

* * * * * * * *

We intend to operate more self-serve stores; the customer can bring her basket, go direct to the shelves, counters and tables and pick out just what she wants. Everything will be plainly marked with the price and weight. We are going to do away with all expensive packages possible, and put a price on the merchandise that will pay our customers to come and pick out what they want and carry it home."

The established sales policy of T. A. Snider Preserve Company, adopted by it and generally practiced, was to distribute its products exclusively through wholesalers and not to sell retailers (Rec. 40). Mr. Davis, the sales manager for T. A. Snider Preserve Company, testified that he knew respondent sold its merchandise exclusively to retailers and that the customers of re-

spondent engaged in the retail grocery business in Lincoln were in direct competition with the eighteen retail stores operated by Basket Stores Company in that city. He recognized that the Basket Stores Company was engaged in the operation of retail stores and as a rule his company did not ship to retailers other than to make a shipment through a selected jobber.

Sometime in September, 1918, the T. A. Snider Preserve Company sold to Raymond Bros. Clark Company, the items of its product set forth in respondent's answer (Rec. 5). It also sold to Basket Stores Company and to other wholesalers, the items of its product set forth in respondent's answer (Rec. 6-7). It is not contended that at the time sales were made, any of these customers of the Snider Company had knowledge of the sales made to others nor is it contended that there was any arrangement made as to the method of shipment. T. A. Snider Preserve Company prepared the several orders for shipment, as shown by Exhibit No. 2 (Rec. 46). All of the orders were included in a single shipment and loaded in one car and consigned to Raymond Bros. Clark Company. This method of shipment was adopted by T. A. Snider Preserve Company because each shipment aggregated less weight than a minimum car weight and all of the orders combined aggregated a sufficient weight to procure car load rate of shipment. Raymond Bros. Clark Company had no knowledge that this car load of merchandise was to be consigned to it and had no knowledge of the sales to any other than itself. The car arrived in Lincoln, Nebraska, on Octo-

ber 10, 1918, and sometime between that date and October 16th, the car was unloaded and contents placed in the warehouse of Raymond Bros. Clark Company. The products were found to be in bad order when received and their condition was clearly shown by Commissioner's Exhibit No. 6 (Rec. 50). When the merchandise was received, directions were given by Raymond Bros. Clark Company to the shipping clerk to make distribution in accordance with the directions of Exhibit No. 2. The order intended for Basket Stores Company was not delivered to that company until November 15th. It does not appear that the Basket Stores Company made any demand for the shipment and the only explanation for the delay presented in the record is found in the testimony of Mr. Raymond. He describes quite clearly the labor difficulties due to the world's war (Rec. 78), and that they were required to change shipping clerks at that time because of the mental condition of the clerk (Rec. 80). Several weeks after the car was received, he observed this shipment had not been delivered and gave immediate orders for delivery. There was no intention upon his part to delay the delivery a single day.

There was no express contract between T. A. Snider Preserve Company and Raymond Bros. Clark Company, making provision for the distribution of the merchandise shipped in this car. The shipping bill, Exhibit "2" (Rec. 46), was received by Raymond Bros. Clark Company on October 7, 1918, and this was the first intimation this company had that the merchandise

for several customers was consigned to it. The next day Raymond Bros. Clark Company wrote the following letter to T. A. Snider Preserve Company (Exhibit 4, Rec. 49):

> "We have at hand your favor of the 7th inst. regarding distribution of car of your goods shipped to the City of Lincoln, and we are very much surprised to note in the same an order for the Basket Stores Company of this city. This concern is nothing but a retail store, and we cannot express our surprise that a concern like the T. A. Snider Preserve Company would sell an outfit like this direct. We ask that you kindly send us credit slip for the regular jobber's profit on this order, and oblige."

The T. A. Snider Preserve Company made no reply to this letter and under the date of October 22nd, 1918, the following letter was written by Raymond Bros. Clark Company to T. A. Snider Preserve Company (Exhibit 5, Rec. 50):

> "Gentlemen:
>
> On October 7th we wrote you regarding credit memorandum for the number of cases of your goods sold to the Basket Stores Company of this city, but up to the present time we have not received same, nor a reply from you.
>
> We also wish you would advise us of the amount we are to charge you for checking out, unloading and re-shipping other jobber's goods in this car shipped to us, and oblige."

The only reply to this letter was a demand for remittance under the date of November 14th.

On the 16th day of November, 1918, Raymond Bros. Clark Company wrote the T. A. Snider Preserve Company the following letter (Ex. 7, Rec. 51):

"Gentlemen:

Answering your letter of the 14th inst. regarding remittance on your account, this remittance will be made promptly when we receive a reply to our numerous letters sent to you regarding charge for checking out and handling this car and credit slip for the sales which were made direct to local retail Basket Stores of this city."

Under the date of November 18th, the following letter was received by Raymond Bros. Clark Company, from the T. A. Snider Preserve Company (Ex. 8, Rec. 51):

"Gentlemen:

We have your letter of the 10th inst. and note that you are holding up our invoice of $1,838.68 on account of some credits which you claim are due you. We do not believe that it is fair to hold up $1800.00 for those items which you claim are due you, which probably would not amount to more than $100.00 or $200.00, at the most and we would thank you to let us have remittance to cover our invoice and you might deduct those charges which you claim are due you, but you must give us invoices fully explaining why we should allow credits for those items.

We would thank you to let us have remittance by return mail and if we find that your deductions are in order we will gladly accept your check. We will give same our immediate attention upon receipt of your check and invoices covering your claims."

On November 29th, Raymond Bros. Clark Company sent a draft to T. A. Snider Preserve Company for

$1,590.42, making deductions in the amount of $27.58, on account of cash discount and the amount of $100.00 commission on Basket Store sales and something over $100.00 on other accounts that are not involved in this matter (Ex. 10, Rec. 52).

Under the date of November 3, 1908, Raymond Bros. Clark Company received the following letter from T. A. Snider Preserve Company (Ex. 9, Rec. 52):

> "Gentlemen:
>
> We are in receipt of your statement of November the 29th, together with check for $1590.42, which we return.
>
> We note that you have made a deduction of $110.68 for which you do not enclose a voucher.
>
> We wish you would kindly send us complete details on this deduction as we have no record of the same.
>
> Regarding your deduction of $100 commission on the order of the Basket Stores Company would say that you are entirely out of line on the same. Their president, Mr. Williams, called on us sometime ago after having been in Washington conferring with the Food Administration, they had a license for both their branches, and we felt as though we were compelled to honor their order.
>
> You also deduct $27.50 past discount to which you are not entitled as the terms on your order are '10 days from date of invoice.' There is $9.35 due you credited on our books, and we wish you would kindly make a deduction on this in sending us your corrected check."

Under the date of December 16, 1918, Raymond Bros. Clark Company wrote the following letter to T. A. Snider Preserve Company (Ex. 11, Rec. 53):

"Gentlemen:

We received yours of the 3rd inst. returning our remittance of November 29th and we are again enclosing the remittance with this letter, and per your letter, we inclose statement for the ledger charges we have against you, and which we deducted.

Regarding the $100.00 commission on the Basket Stores order will state that we certainly think we are entitled to this commission. Regardin the Basket Stores there is no question but what they have a food administration license because they do a large enough retain business to compel them to take out a license but they are simply retailers in every sense of the word. They do not operate a wholesale store and never have. They may have a warehouse from which they distribute goods to their various houses but they do not quote these goods to the trade and do not sell to other retailers. If we had had any inkling of any suspicion that you would take an order from these people and ship direct and bill goods to them direct, you never would have had a dollars worth of business from Raymond Bros. Clark Company, for we do not intend to buy from manufacturers who compete with us for the retail business of our own home town and if you do not feel inclined to give us the $100.00 on this car for our commission we ask that you kindly give us shipping instruction for all the goods of yours that we have in our house.

Regarding our deduction for this account, this was simply a matter of your own neglect. We wrote you immediately on receipt of your invoice regarding commission on Basket Stores goods and regarding the delivery and checking out charges on this car load but we received no reply from you. Had we received your prompt reply you would have received your money promptly."

On January 12, 1919, Mr. Davis, representing T. A. Snider Preserve Company, called upon Mr. Ray-

mond of the Raymond Bros. Clark Company in Lincoln, Nebraska, with a view of adjusting the $100.00 claimed on account of the sale to Basket Stores Company, but they were unable to agree upon a settlement. Mr. Davis appeared as a witness and is the only witness who was connected with the T. A. Snider Preserve Company. He testifies that he recognized the distinction between wholesale dealers and retail dealers and that it would be utterly impossible for a wholesaler to handle his product if he sold to one or more retailers at the same price he gave to the wholesaler (Rec. 36).

Mr. Raymond, of the Raymond Bros. Clark Company, told the representative of T. A. Snider Preserve Company, that the Basket Stores Company was engaged in the operation of retail grocery stores, and when he made this statement he says that he believed it to be true (Rec. 82).

Raymond Bros. Clark Company has made no purchases from T. A. Snider Preserve Company since the incident involved in this controversy. The testimony upon hearing was taken in January, 1920, more than fifteen months after the T. A. Snider Preserve Company products were received by respondent and at the time of the hearing the respondent yet had on hand and unsold a large portion of the shipment of merchandise (Rec. 86).

The president of the Basket Stores Company testified that in the operation of the retail business of the company they frequently sell merchandise for less than cost, taking into consideration the expense of doing business.

The Federal Trade Commission made its findings of fact as set forth in the record commencing on page 10. These findings of fact conform with the foregoing statement of facts and present findings of the separate acts constituting the single transaction between respondent and Snider Preserve Company.

The conclusion of the Federal Trade Commission was that the conduct of respondent as set forth in its findings of fact tended to and did unduly hinder competition between the Basket Stores Company and others similarly engaged in business, and that respondent intended to press the T. A. Snider Preserve Company to a selection of customers, in restraint of trade.

After making the findings of fact the Federal Trade Commission, on the 23rd day of February, 1921, entered the following order:

> "Ordered, that the respondent, Raymond Bros. Clark Co., its officers and agents, forever cease and desist from directly or indirectly—
>
> (1) Hindering or preventing any person, firm or corporation in or from the purchase of groceries, provisions, or the like commodities direct from the manufacturers or producers thereof, in interstate commerce, or attemptng so to do.
>
> (2) Hindering or preventing any manufacturer, producer, or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.
>
> (3) Influencing or attempting to influence any manufacturer, producer or dealer in groceries, provisions, and the like commodities not to accept as a customer any firm or corporation which the manufacturer, producer, or dealer in the exercise of a free judgment, has or may desire to have such relationship."

BRIEF OF ARGUMENT.

I.

The evidence offered before the Federal Trade Commission does not support the findings of the Commission.

All of the findings of fact made by the Federal Trade Commission, with the exception of Nos. 3 and 4 are contrary to the evidence. The Basket Stores Company was not a competitor of respondent but was, in fact, engaged in the operation of seventy-two retail grocery stores (Rec. 58). The Federal Trade Commission correctly found that 90 per cent of its sales were made to consumers through retail stores (Rec. 11, Finding 2). Respondent was engaged exclusively as a wholesaler. A retail grocer is defined by the uncontradicted evidence to be one who generally sells direct to the consumer and the wholesaler is one whose general practice is to sell to retailers (Rec. 42). The Basket Stores Company was not licensed by the Government as a wholesale grocer but held a license issued by the United States Food Administration, because its volume of business as a retailer required it to have such a license. Respondent at no time requested T. A. Snider Preserve Company to refrain from selling its products to Basket Stores Company nor did it at any time threaten to withdraw its patronage if such sales were made. The evidence upon this subject is confined to the letters written by respondent (Ex. 4-5-6-7-11, Rec. 49-53) and the testimony of Davis (Rec.

26-33). The T. A. Snider Preserve Company had always maintained a sales policy of selling only to wholesalers (Rec. 40). The letters of respondent expressed only surprise at a change in sales policy and declared that respondent would not have made the purchases had it known of these changes.

II.

The complaint does not charge an unfair method of competition and is not of interest to the public.

The questions presented in petitioner's brief (10) are purely academic and find no foundation in the record. The complaint charges only a single controversy between the respondent and a single manufacturer (Rec. 2). It does not charge an *unfair method* of competition upon the part of respondent. The facts alleged in the complaint show clearly that the sole transaction complained of is not of interest to the public. There is no claim made that the respondent ever had any other similar controversy with any manufacturer or other person whomsoever, or that it has the slightest inclination to have any other such controversy. The evidence discloses that after respondent received a shipment of products from T. A. Snider Preserve Company, which it had ordered then for the first time it learned that T. A. Snider Preserve Company had shipped a large order to Basket Stores Company at the same price charged respondent. Such products were to be sold by Basket Stores Company in its seventeen (17) retail stores located in the City of Lincoln, in competetion with respondent's customers

and respondent then realized it could not resell the products it had purchased without making the sales at a loss.

Commissioners Exhibits 4-5-6-7 and 11 (Rec. 49-50-51-53).

A.

It is necessary that the proceedings before the Federal Trade Commission shall be of *interest to the public* and also that *unfair methods* of competition in commerce were employed, as comprehended by the Acts of Congress relating to interstate commerce and the interpretations thereof made by the courts.

Sec. 5 Federal Trade Commission Act.

Aluminum Company of America v. *Federal Trade Comm*., 284 Fed. 401.

Beech-Nut Packing Company v. *Federal Trade Commission*, 264 Fed. 885.

Federal Trade Commission v. *Gratz*, 258 Fed. 314.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Federal Trade Commission v. *Curtis Pub. Co.*, 43 Sup. Ct. Rep. 210 (213).

Kinney-Rome Company v. *Federal Trade Comm.*, 275 Fed. 665.

Standard Oil Company v. *Federal Trade Comm.*, 282 Fed. 81.

Mennen Company v. *Federal Trade Comm.*, 288 Fed. 665.

Winstead Hosiery Co. v. *Federal Trade Comm.*, 272 Fed. 957.

Sinclair Refining Co. v. *Federal Trade Comm.*, 276 Fed. 686.

New Jersey Asbestos Co. v. *Federal Trade Comm.*, 264 Fed. 509.

B.

A single act even though it may be subject to criticism as unfair or immoral without evidence of a *general practice* tending to establish an *unlawful method* in business, is of concern only to the individuals interested and is not a matter of *public interest* and does not constitute *"unfair methods of competetion."* Of such single acts the courts and not the Federal Trade Commission have jurisdiction.

Federal Trade Commission v. *Gratz*, 258 Fed. 314.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Royal Baking Powder Co. v. *Federal Trade Comm.* 281 Fed. 744.

III.

The order of the Federal Trade Commission is improvident and does not follow the complaint and is not based upon the allegations of the complaint.

The order to desist (Rec. 128) entered by the Federal Trade Commission does not follow the charge made in the complaint or the findings of fact. The complaint deals with a single transaction and the findings of fact made by the Commission relate to a single controversy between respondent and T. A. Snider Preserve Company over a single shipment of merchandise. The order to desist entered by the Commission commanded respondents to desist from all acts of a like character with the entire commercial world.

A.

The order to desist entered by the Federal Trade Commission is improvident and was rightfully annulled by the Circuit Court of Appeals, because it does not follow the complaint and is not based upon the findings of fact. The order to desist cannot be broader than the charges made in the complaint and the findings of fact.

Opinion of Circuit Court of Appeals in this case (Rec. 131) Sec. 5 of Federal Trade Commission Act.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Western Sugar Refining Co. v. *Federal Trade Comm.*, 275 Fed. 725.

IV.

The conclusion and order of Federal Trade Commission denies to respondent the right to select the merchandise it will purchase and the manufacturers from whom it shall make its purchases.

The only claim of violation of law, on the part of the respondent, is that it threatened to decline to make further purchases of merchandise from T. A. Snider Preserve Company if this company sold to retail dealers. Respondent claims the right to select the manufacturer from which it will purchase and insists that it had a right to make this selection by eliminating any manufacturer who sells to competitors of its customers at the same prices charged to wholesalers. If Basket Stores Company could acquire the Snider products for re-sale to consumers at the same price paid by respondent, it naturally follows that this respondent must then elect between re-selling

the products to independent dealers at actual cost or declining to purchase the products. The only wrong claimed to have been committed by respondent was that it declined to purchase merchandise from the T. A. Snider Preserve Company for reasons that were satisfactory and made the announcement of such reasons in plain English.

A.

A dealer in merchandise has the positive right to select the merchandise he may wish to purchase, and to select the persons from whom he may wish to make his purchases. This he may do for any reasons that seem sufficient to him or for no reason at all. He may announce his reason without fear of subjecting himself to liability of any kind. He has also the unquestioned right to discontinue dealing with any manufacturer for any reason or for no reason at all.

U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S. 290.

U. S. v. *Colgate & Co.*, 250 U. S. 300.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Jergens v. *Woodbury*, 271 Fed. 43.

Cudahy Packing Company v. *Frey & Sons*, 261 Fed. 65 (67).

Union Pacific Coal Company v. *U. S.*, 173 Pac. 737.

Deuber Watch Case Co. v. *Howard Watch & Clock Co.*, 66 Fed. 637 (644-645).

Western Sugar Refinery Company, et al. v. *Federal Trade Commission*, 275 Fed. 725.

Kinney-Rome Co. v. *Federal Trade Commission*, 275 Fed. 665.

Eastern States Retail Lumber Dealer's Assn. v. *U. S.*, 234 U. S. 600.

U. S. v. *American Tobacco Company*, 221 U. S. 106.

Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46-48.

Beech-Nut Packing Co. v. *Federal Trade Commission*, 264 Fed. 885.

Southern Hardware Jobbers Assn. v. *Federal Trade Commission*, 290 Fed. 773.

Mennen Company v. *Federal Trade Commission*, 288 Fed. 774.

Wholesale Grocers Assn. of El Paso, Texas, v. *Federal Trade Commission*, 277 Fed. 657.

Grenada Lumber Company v. *Mississippi*, 217 U. S. 433 (440).

Journal Publishing Co. v. *Tribune Co.*, 286 Fed. 112.

"B."

The Acts of Congress, together with the court constructions, furnish the standard for determining whether acts complained of constitute *unfair methods* in commerce. Where there is an entire absence of combination or agreement with other dealers and the effect of the Act is not to create a monopoly, a dealer possesses the absolute right to determine for himself whether he shall expend his money for any particular property or with any particular person.

Granada Lumber Co. v. *Mississippi*, 217 U. S. 433 (440).

Standard Oil Company v. *Federal Trade Comm.*, 282 Fed. 81 (87).

United States v. *Colgate & Co.*, 250 U. S. 300.

Southern Hardware Jobbers Assn. v. *Federal Trade Comm.*, 290 Fed. 773.
Wholesale Grocers Assn. of El Paso v. *Fed. Trade Comm.*, 277 Fed. 657.

V.

A dealer may urge a manufacturer to adopt a particular sales policy agreeable to his wishes and may advance such reasons as occur to him why the policy he has advocated should be adopted and may declare his unwillingness to trade with such manufacturer excepting upon his own terms.

U. S. v. *Southern Wholesale Grocers Assn.*, 207 Fed. 434 (443).
U. S. v. *Colgate & Co.*, 250 U. S. 300.

VI.

In order that coercion may exist in absence of physical force a person must be induced to do or perform some act because of the unlawful conduct of another under circumstances which deprive him of the exercise of his free will.

Black Law Dictionary.
State ex rel. Smith v. *Daniels*, 136 N. W. 584.
Adair v. *U. S.*, 208 U. S. 161.

ARGUMENT.

II.

The complaint does not charge an unfair method of competition and is not of interest to the public.

If we are to concede jurisdiction in the Federal Trade Commission over the matters charged in this complaint, we must at once degrade this great instrumentality of the Government It will then cease functioning as designed by Congress and become a referee of little controversies between merchants.

The Circuit Court of Appeals for the Second Circuit, in the case of *Winstead Hosiery Company* v. *Federal Trade Commission*, 272 Fed. 957, concisely and tersely states the powers of the Commission.

> "The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce if so doing will be of interest to the public. And if such method of competition is prohibited by the Act, to issue an order requiring the person or corporation using it to cease and desist, from doing so. We have heretofore so understood the extent of the Commission's authority in *Federal Trade Commission* v. *Gratz*, 258 Fed. Rep. 314; affirmed 253 U. S. 421 and *New Jersey Asbestos Company* v. *Federal Trade Commission*, 264 Fed. Rep. 509.

It would undoubtedly be very nice and possibly in these times very much appreciated, if some individual or

commission had the right to say to every purchaser of merchandise in America, that he must pay for merchandise upon due date and that he must not deduct a cash discount unless in strict accord with terms of sale. It is barely possible that the amount sought to be exacted by Raymond Bros. Clark Company was excessive, but with this, surely the Federal Trade Commission has no concern and certainly Congress had no power to vest it with any authority concerning it.

Permit me to quote from *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686:

> "Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under Section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome* case, *supra*, amount to an unfair method of competition.
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> * * * * * * *
>
> "It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various—superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freight, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held

unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said:

'Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us. If you wish to use them otherwise you may and must buy them. In kind that is nothing more than loaning a barrel, with a faucet in it.'

* * * * * * * *

"If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and power to judge what is too fast a practice for some and to compel others to slow up. In other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practice from business and inter state commerce."

The authority of the Federal Trade Commission depends upon the power granted to it by the Act of Congress. An analysis of this act clearly shows that the Federal Trade Commission does not have jurisdiction to enter an order respecting the matters charged in this complaint. The Commission is authorized to proceed respecting "unfair methods of competition in commerce." It is not authorized to proceed against a single act where such act does not constitute a method and where in the

very nature of the circumstances, the act is not probable of repetition. The construction given by the Supreme Court of the United States, in the case of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, sustains this contention:

> "When proceeding under Section 5, it is essential, first, that, having reason to believe a person, partnership or corporation has used *an unfair method* of competition in commerce, the Commission shall conclude a proceeding 'in respect thereof would be to the interest of the public'; next, that it formulate and serve a complaint stating the charges *in that respect*" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint."

In the case of *Sinclair Refining Compay* v. *Federal Trade Commission, supra*, this question is directly determined and this rule is likewise declared in the case of *Kinney-Rome Co.* v. *Federal Trade Commission, supra*.

> "Neither section (Sec. 5, Federal Trade Commission Act; Sec. 3, Clayton Act) relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where *there are practices* that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome case, supra*, amount to an unfair method of competition."

We contend that when the complaint is liberally construed it does not charge "unfair methods of competition." This question, in our case, is quite similar

to the question found in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled, by the court.
>
> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

It is essential that there shall be involved *practices* of a fraudulent or unlawful character in order that the Commission shall have jurisdiction of the subject matter. The uncontradicted evidence in this case shows with positive clearness, that the subject under examination comprised individual acts that cannot be said to constitute practices. The complaint charges a refusal on the part of respondent to deliver a consignment of goods intended for the Basket Stores Company within a reasonable time after receiving them. It further charges the refusal to

make this delivery, was because the manufacturer would not pay the respondent the sum of $100.00. Unquestionably the respondent was entitled to some compensation but the amount thereof might well be in dispute. Respondent was under no legal obligation to accept the burden of making delivery of the goods intended for the Basket Stores Company. Certainly it could not be required to make such delivery without compensation. It is not contended that the particular manufacturer ever made any other shipment of like character under like circumstances to respondent, nor is it claimed that any other manufacturer ever had a similar experience with respondent. It is not claimed that it is necessary for this particular manufacturer to continue making his shipments in this way, nor that such method constitutes the general business practice of the manufacturer. There is not even the slightest pretense that the business methods covered by the Commission's order were ever practiced or indulged in. The entire controversy is devoid of any particular method of business.

B.

When you analyze the complaint you find it deals entirely with a single transaction or a single controversy. You will also find that this transaction or this controversy is one of interest only to the Snider Preserve Company or Basket Stores Company and this respondent. The Federal Trade Commission Act seeks to prevent "unfair method in competition" and not an unfair act of a competitor. If the Federal Trade Commission is to have the

jurisdiction for which it contends the Commission should be enlarged so there would be at least one commissioner for every county in America. It should be provided with a constabulary much larger than our war time army. Just briefly analyze the facts. Complainant ordered a shipment of Snider Preserve Company products for re-sale to independent retail grocers. Up to that time this respondent believed the Snider Preserve Company had a sales force under which it sold only to wholesalers. This is also a conceded fact. This manufacturer, without notice to respondent, sold a large shipment to Basket Stores Company for re-sale, principally through its seventeen retail grocery stores in competition with respondent's customers. The respondent was surprised upon receiving information of this sale and advised the manufacturer that it would not have purchased the products had it known of this sale to the Basket Stores Company. Respondent also demanded the payment of $100.00 for its service in checking out and delivering the products shipped in the pool car. Snider Preserve Company objects to paying the amount of compensation demanded. Here we have but a single transaction by one small wholesale grocer in the interior of the country and the Federal Trade Commission proceeds to adjudge it to be an unfair method. The Federal Trade Commission finds the facts substantially as above outlined and then enters an order to the effect, that respondent must never again refuse to purchase the products of any manufacturer simply because such manufacturer elects to sell his products to chain store organizations. It would be

just as reasonable if the Federal Trade Commission would order respondent to hereafter refrain from declining to purchase canned goods unless the manufacturer would label them according to the wishes of the respondent. The fact is, the Federal Trade Commission is dealing entirely with a controversy which in its very nature amounts simply to an individual grievance.

In the case of *Federal Trade Commission* v. *Gratz*, 258 Fed. 314, we find the following:

> "We think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed."

Had respondent paid the invoice of the Snider Preserve Company without deducting its claim for $100 this case would not have been brought into existence. The real offending of respondent is found in its unwillingness to part with its money for merchandise that it could not possibly re-sell by reason of the manufacturers policy of distribution. It is probably true that respondent had a fairly pronounced conviction that it really had a fairly good title to its own money and had a right to claim the privilege of expending it or keeping it. Others may think that the excuse of respondent was a very poor one. Be that as it may the excuse was sufficiently satisfying to respondent.

This same question is referred to in the case of

Royal Baking Powder v. *Federal Trade Commission*, 281 Fed. Rep. 744 (745):

> "The commission in carrying into effect the provisions of the act is authorized to institute proceedings against those it has reason to believe are violating the terms of the statute. The proceedings which the commission is authorized to institute are not punitive, and no form of punishment is provided. It is not intended that compensation is to be made for any injuries which may have been suffered. The intent of the act is the prevention of injury to the general public. What the commission is created to deal with is, not acts of unfair competition, but the use of unfair methods of competition."

The statute contemplates that the particular "unfair method of competition in commerce" is of interest to the public. In this particular controversy the public can have no interest whatever. There is no claim that respondent used any effort to keep the manufacturer from selling the Basket Stores Company. At most the respondent simply advised the manufacturer that it would not purchase such products if sales were made to the Basket Stores Company. The respondent did not combine or collude with any other person whomsoever and there is no contention that respondent ever advised any other living mortal of its proposed position. There is not the slightest contention that any person in the world outside of the three parties above referred to had any knowledge of this controversy until the filing of the complaint by the Federal Trade Commission.

In the case of *Standard Oil Company* v. *Federal Trade Commission*, 282 Fed. 81 (87) we find a clear statement of the question under consideration:

> "Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize,' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein.' "

It surely cannot be contended that the refusal of respondent to purchase merchandise for re-sale to independent retail grocers from a manufacturer who is selling to the retail trade at the same price he charged the jobber will amount to a restraint of trade. Neither would tend to create a monopoly. The record in this case shows that the Basket Stores Company could not resell these products under the circumstances existing in its market.

In the case of *Wholesale Grocers Association of El Paso* v. *Federal Trade Commission*, 227 Fed. 657 you have the issue of a combination between wholesale grocers to interfere with sales by manufacturers to chain store organizations. In that case the court clearly recognized

the right of the individual jobber to refrain from purchasing the products of any manufacturer:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

The above quotation is from the opinion by this court in the case of *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433. The opinion in the *Wholesale Grocers Association case* v. *Federal Trade Commission* quotes further from the Grenada case and then distinguishes the facts:

> "What the associated jobbers severally did went beyond each of them refraining altogether or to a less extent from buying from manufacturers whose products were sold directly to the Standard Grocery Company. They combined and co-operated with others to keep manufacturers willing to do so from selling their products directly to the Standard Grocery Company, and by that means to obstruct or prevent that company from competing as a wholesaler in territory sought to be appropriated by dealers not doing a combined wholesale and retail business."

Congress certainly never intended to give to the Federal Trade Commission the power to impress its opinion on the commerce of the country and give to that opinion the force of law. The Commission was clearly designed to prevent abuses in commerce by the employment of unfair methods injurious to the public and as defined by law.

Counsel for the Federal Trade Commission insists that the T. A. Snider Preserve Company should be permitted to select such medium of distribution as would meets its best judgment. Counsel's contention is that this manufacturer should have the right to distribute through wholesalers or through chain stores and should be perfectly free to select either or both. All we insist upon is that the wholesaler shall have equal freedom in the conduct of its business. If the manufacturer has a lawful right to select one of the above mediums for distribution and refrain from employing the other why has not the jobber or the chain store an equal right?

III.

The order of the Federal Trade Commission is improvident and does not follow the complaint and is not based upon the allegations of the complaint.

The order to desist in this case was entered by the Federal Trade Commission upon a charge that respondent violated Sec. 5 of the Federal Trade Commission Act. This complaint charged the respondent with certain transactions concerning a single item of business. The complaint and the findings of fact as well. relate only to a single item of business between respondent and T. A. Snider Preserve Company. Under all court constructions, the order to desist must not be broader than the unfair methods of competition charged in the complaint. This is the only fair construction that could be given to Sec. 5. In presenting our construction of this section of the act it is quite desirable to have before us a copy of Sec. 5:

> Sec. 5. Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using *any unfair method of competition in commerce*, and if it shall appear to the Commission that a proceeding by it in *respect thereof* would be to the interest of the public, it shall issue and serve upon such persons, partnership or corporation,. a comp[illegible]nt *stating its charges in that respect.*
>
> * * * If upon such hearing the Commission shall be of the opinion that the *method of competition in question* is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the person, partnership or corporation an order requiring such person, partnership, or corporation, to cease and *desist from using such method of competition.*

The section requires that the complaint shall state "the charges in that respect." This expression refers to the *charges* which the *commission believed* to constitute *"unfair methods of competition."* We then observe that if upon hearing *"the method of competition in question"* is found to be unlawful, the order to desist shall be made. This finding by the Commission must be that *"the method of competition in question"* is found to be unlawful. Clearly, the Commission could not find that some other method than that which was charged in the complaint was unlawful, but the Commission is restricted to a finding that the *"method of competition in question"* is unlawful. This section of the Federal Trade Commission Act authorized the Commission to order a cessation and desisting *"from using such methods of competition."* The authority to order a desisting refers specifically to

the "*methods of competition*" and were "*in question*" that is, the methods of competition *charged* to constitute "unfair methods of competition in commerce," in the complaint.

This question was clearly determined by the Supreme Court of the United States in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421:

> "When proceeding under Section 5, it is essential, first, that, having reason to believe a person, partnership or corporation has used an unfair method of competition in commerce, the Commission shall conclude a proceeding "*in respect thereof would be to the interest of the public*"; next, that it formulate and serve a complaint stating the charges "*in that respect*" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist *from the violation of the law so charged* in said complaint." If after a hearing, the Commission shall deem "the method of competition *in question*" is prohibited by this act, "it shall issue an order requiring the accused to cease and desist from using *such method of competition.*"

The Circuit Court of Appeals for the Ninth Circuit, in the case of *Western Sugar Refining Company et al.* v. *Federal Trade Commission*, 275 Fed. 725, refers to the Gratz case upon this question, as follows:

> "In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (427), the Supreme Court, referring to the proceedings and order under Section 5 of the Federal Trade Commission Act, said:
>
> > 'Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.' "

"It follows that the order of the Commission must follow the charge in the complaint and that the charge in the complaint must be supported by evidence."

In this case the complaint charges specific acts. The complaint charges a failure to deliver merchandise to Basket Stores Company and threats to coerce Snider Preserve Company to refrain from selling to Basket Stores Company. The order of the Commission does not pretend to follow the complaint. The order (Rec. 144) requires Raymond Bros. Clark Company to cease and desist from:

1. Hindering or preventing any person, firm or corporation in or from the purchase of merchandise, provisions or like commodities direct from the manufacturer or producer thereof, in interstate commerce or attempting so to do.
2. Hindering or preventing any manufacturer, producer or dealer in groceries, provisions and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.
3. Influencing or attempting to influence any manufacturer, producer or dealer in groceries, provisions and the like commodities, not to accept as a customer, any firm or corporation that the manufacturer, producer or dealer, in the exercise of a free judgment, has or may have such relationship.

The orders of the Federal Trade Commission proceed along the lines of a complaint against *methods* in commerce while the complaint itself charges *a single act*

to be unfair. The complaint charges that the purpose of Raymond Bros. Clark Company was to cut off supplies from the Basket Stores Company and to stifle competition between it and the Basket Stores Company and to interfere with the Basket Stores Company and Snider Preserve Company in trading with each other.

We believe it requires only a reading of the order and a reading of paragraph 4 of the complaint to dispose of this proposition.

IV.

The conclusion and order of Federal Trade Commission denies to respondent the right to select the merchandise it will purchase and the manufacturers from whom it shall make its purchases.

This entire controversy centers around the belief of respondent that it had a perfect right to decline to purchase the products of any manufacturer for any reason that seemed good to it. Respondent apparently also indulged the belief that it had the lawful right, when declining to purchase the products of any manufacturer, to honestly and candidly express the reasons for such refusal. It appears, without conflict, that the T. A. Snider Preserve Company was the manufacturer of certain products which it had uniformly been selling exclusively through wholesalers. Raymond Bros. Clark Company engaged in carrying on the business of a wholesale grocer had been purchasing these products and on this particular occasion gave to a representative of the T. A. Snider Preserve Company an order for a fairly large sized shipment. The next chapter in the controversy opens with the indigna-

tion of Raymond Bros. Clark Company upon finding that T. A. Snider Preserve Company had changed its sales policy without notice. It appears that at the same time the traveling representative of T. A. Snider Preserve Company obtained the order from respondent he also obtained an order for a fairly large shipment from Basket Stores Company. It is conceded by all parties that Raymond Bros. Clark Company was selling its merchandise to a large extent to the independent grocers in Lincoln. The Basket Stores Company maintained seventeen retail stores in Lincoln for sale of its merchandise direct to the consumer. The respondent purchased these products from T. A. Snider Preserve Company with a view of re-selling them to its customers and particularly the independent retail stores in Lincoln.

Counsel for the Federal Trade Commission opens his statement of facts with "this is one of many controversies which have reached the Commission and the courts arising out of the developments in the business world which appear to manifest an economic tendency toward a more direct system of distributing the products of factory and farm to the consumers thereof." Counsel then makes this very broad and pertinent admission:

> "If a chain of retail stores can purchase its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores can sell commodities to the purchasing and consuming public at prices below those made by others through

which commodities are distributed from the manufacturer, to wholesaler, to retailer."

We are mindful of the settled conviction of the Federal Trade Commission that the philosophy for distribution of food stuffs sought to be promoted is sound and in the interest of the general public. As a matter of fact, the soundness of this position upon this great economic question is of very little materiality to a correct solution of this case. At the same time we cannot permit the presentation of such a theory to pass unchallenged. It is quite apparent that no one has considered the effect upon consumers of the establishment of a system whereby the sales to consumers will be controlled by a single combination or several combinations. It is quite apparent that no one has considered that there are in infinite number products of the factory and the farm that cannot be economically handled from the producer to the consumer or to the consumer through a single agency. It always will be necessary to maintain some system whereby there shall be collected by some warehousing agency, many of the commodities that are necessary for the retailer and yet that the demands of his trade will not permit direct shipment from the producer. True, this can be handed by the warehousing facilities, of large combinations, controlling many retail stores. You change from the old time system of distribution advocated by such expressions as we have quoted from counsel for Federal Trade Commission and you step from a system of independent merchandising to a system of monoply. Of course, it is possible that the chain stores, after extinguishing the in-

dependent store, would establish for itself a code of morals that would permit it only to take a living toll notwithstanding it had no competetion. We are rather inclined to believe that a little serious thought upon this subject, with the real picture of correct merchandising in hand, would not be out of place. As we view it, it is but one step from independent merchandising to monopoly and perhaps we may then expect legislation controlling prices instead of legislation promoting free competition.

The jobber has no right to prevent the chain stores from purchasing from any manufacturer wishing to sell to them and the manufacturer must be and is perfectly free to select his own customer. Counsel for the commission appears to us to be occupying a position that is illogical. He asserts "the manufacturer should be free to select either of these methods of distribution or employ both." Just a few sentences before this one, we find the positive assertion by him that, "obviously such stores (chain stores) can sell commodities to the purchasing and consuming public at prices below those made by others through which commodities are distributed from manufacturer, to wholesaler, to retailer." It is self evident, when we consider this truthful statement, that the wholesaler could not expect to sell products to an independent retailer engaged in competition with the chain stores on products purchased direct from manufacturers. We grant the contention of the Federal Trade Commission that the manufacturer should be free to select its method of distribution, but we exact the same privilege for ourselves.

We contend that respondent had a perfect right to refuse to purchase T. A. Snider Preserve Company products for any reason that appeared to be good to it. This reason might indeed be a very foolish one and still respondent could keep its money until it saw fit to spend it for the property of someone else willing to sell. The order to desist entered by the Federal Trade Commission is equivalent to a command, that respondent must not hereafter refuse to purchase from any manufacturer who sells direct to the retail trade. How can respondent obey this command excepting by purchasing from such a manufacturer, although it has concluded that it did not wish to do so. We assume respondent might refuse to purchase Snider catsup if it concluded that it would rather handle Campbell catsup. We are, however, solemnly told that we must not refuse to purchase Sniders catsup, if our reasons for not wishing to purchase that product is based upon the methods of business carried on by Snider. We have always assumed that a man might keep his money until he concluded to spend it for something that he wished to purchase. When he decided to part with his money he might be acting upon a very foolish reason. Certainly we have not degenerated to that point that the Government through one of its greatest departments is going to pass upon the soundness or unsoundness or the fairness or unfairness of the reason upon which a purchaser will act. The Federal Trade Commission insists that Snider Preserve Company shall have the right to select the Basket Stores Company as a customer if it wants to.

We believe there should be just as emphatic insistence that the respondent in this case should be permitted to select the manufacturers from which it will purchase.

We have felt that the question involved in this case is really not a fair subject for debate. It seems clear to us that Congress never intended, if indeed it could do so, to take from any man the natural right to deal or refrain from dealing as he might wish. We know of no qualification to this statement other than that he shall not combine or conspire with others respecting the subject. It has been frequently held that the dealer has the unquestioned right to cease dealing with a wholesaler or a manufacturer for any reason that seems good to himself. This has always been treated by the courts as a natural right that was never intended to be taken away. In the case of *Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600 the court says:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 54 L. Ed. 826, 30 Sup. Ct. Rep. 535. 'When the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited

> or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.' "

There is no contention on the part of the Federal Trade Commission that Raymond Bros. Clark Company acted upon or pursuant to any agreement or combination. The respondent simply exercised its individual freedom to refrain from purchasing Snider Preserve Company products because it did not like its sales policy. Suppose that respondent had suddenly changed its policy and advertised that it would sell merchandise to all consumers in the City of Lincoln and at the same price that it would sell to retailers, it is barely possible that there would be found at least one retail merchant in the city of Lincoln who would say to himself that we cannot pay to Raymond Bros. Clark Company the same price our customers pay and yet expect to sell. The Federal Trade Commission would undoubtedly insist that Raymond Bros. Clark Company shall be privileged to sell to consumers as well as to retailers. No one can gainsay that this privilege should be accorded to that company. It would seem, however, decidedly unfair if the Federal Trade Commission should put some little retail grocer to a large expense, because he had refused to continue to purchase from Raymond Bros. Clark Company after its change in sales policy.

The right of the individual dealer to select his own customer is fully discussed in *Western Sugar Refining Company et al.* v. *Federal Trade Commission*, 275 Fed. 765:

"It is the settled law that the individual dealer may select his own customers for reasons sufficient to himself, and he may refuse to deal with a proposed customer who he thinks is acting unfairly and is trying to undermine his trade. *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 614. But, as was said by the Supreme Court in *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433, 440:

> When the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another cause is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.

The evidence before the court was the evidence before the Commission.*

> The Western Sugar Refining Company and the California and Hawaiian Sugar Refining Company sold their sugar to the Los Angeles jobbers and they, in turn, sold or would sell to the Los Angeles Grocery Company as to a retail dealer, but the refiners would not sell direct to Los Angeles Grocery Company at the usual rates and terms to jobbers for the reason, as stated by them, that they did not regard the Los Angeles Grocery Company as a wholesale dealer or jobber. There is no testimony in the record that this course of action on the part of the two sugar refiners arose from any actual understanding or agreement between them or with the Los Angeles jobbers. The testimony proves that it was a concurrence of opinion as to the classification to be given to the Los

> Angeles Grocery Company, but we do not find anything more in the testimony. This classification appears from the testimony to have been erroneous, but as long as it was the individual opinion and action of the refiners, it could not be made the basis of a finding of conspiracy or combination between the two refiners, or between them and the jobbers, or between them and the brokers.
>
> The difficulty has long been recognized of drawing a definite line between the innocent act of an individual and the same act made unlawful by reason of its being the joint or combined act of two or more, but whenever this question arises there must be some legal evidence to establish the unlawful combination or conspiracy, or facts from which that inference may be legally drawn, or the charge must fail. We do not find such evidence in this record with respect to the two sugar refiners."

It is frequently difficult to draw the line between acts of the individual which may be innocent and which may be unlawful. There may be a concert of action by many individuals that will sustain the charge of a combination in restraint of trade and yet it may be difficult to point out the existence of a precise contract or understanding. Such a contract or combination may, of course, be implied. In this case, however, there is not even the suggestion of a combination by respondent with any person whomsoever. It is not even suggested that respondent ever informed any other person, company or corporation of its proposed action. In the "pool car" in which the particular products were shipped to the respondent and the Basket Stores Company we find shipments to some half a dozen other wholesale deal-

ers. There is not even a suggestion that respondent mentioned its course or proposed course to any of those wholesalers. It seems clear to us that unless there has been a violation of the Sherman Act or the Clayton Act that the right of the individual to select his customers remains secure. In the case of *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company*, 227 Fed. 46, the following statement is rather pertinent:

> "Before the Sherman Act, it was the law that a trader might reject the offer of a proposed buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social. That was purely his own affair, with which nobody else had any concern. *Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act has changed the law* in this particular. We have not reached the stage where the selection of a trader's customer is to be made for him by the Government."

This question is also discussed in the recent case of the *United States* v. *Colgate & Company*, 250 U. S. 300:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade and commerce—in a word, to preserve the right of freedom to the trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to

> exercise his own independent discretion as to parties with whom he will deal. And of course he may announce in advance the circumstances under which he will refuse to sell."

The right of the trader to exercise the privilege of selecting customers was recognized in the case of *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, where the distinction is made between a private business and the business of a common carrier:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases."

In the case of *Kinney-Rome Company* v. *Federal Trade Commission*, this principle is recognized and followed:

> "(4) In determining whether there was used 'an unfair method of competition' it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What then may the merchant do? In *United States* v. *Freight Ass'n*, 166 U. S. 290, the Supreme Court said, at page 320:
>
> 'The trader or manufacturer * * * carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction.'
>
> That case has been repeatedly approved, and a portion of that language was used in *United States* v. *Colgate*, 250 U. S. at page 307."

It seems hardly necessary to direct attention to the numerous other cases announcing this principle but as we cite them in our brief we will present short quotations from some of them:

Jergens Co. v. *Woodbury, Inc.*, 271 Fed. 43 (44):

> "The charge made in the proposed answer, as I view it, falls within the principle laid down in *Federal Trade Commission* v. *Gratz* and *United States* v. *Colgate & Co.*, to the effect that a trader or manufacturer may, in the absence of an intent to create or maintain a monopoly, freely exercise his own discretion as to parties with whom he will deal, and that he may announce in advan e the circumstances under which he will refuse to sell."

Federal Trade Commission v. *Gratz*, 253 U. S. 421:

> "All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

Cudahy Packing Company v. *Frey & Son*, 261 Fed. 65 (67):

> "Since the defendant, under the Colgate case, merely exercise the right reserved by the Clayton Act to dealers of 'selecting their own customers in *bona fide* transactions and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price."

Union Pacific Coal Co. v. *U. S.*, (1909) 173 Fed. 737:

> "There was no law which forbade the coal company to prescribe the terms on which it would sell its product to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the Act of July 2 1890, which deprived the coal company of any of these common rights of the owners and vendors of merchandise, and if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not the violation of the Sherman Anti-trust Act charged in the indictment."

Deuber Watch-Case Co. v. *E. Howard Watch & Clock Co.*, 66 Fed. 637 at 644 and 645:

> "An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern with which governmental paternalism has not as yet sought to interfere, except when the property he owns is 'devoted to a use in which the public has an interest;' and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity."

The respondent is engaged in an entirely private business seeking to sell merchandise to independent retail grocers. As conceded by counsel for the Federal Trade Commission, it could not hope to sell the products of Snider Preserve Company to retail grocers, if the Snider Preserve Company was competing for that business and offering to sell to retailers at wholesale price. In the case of the *Mennen Company* v. *Federal Trade Commission*, 288 Fed. 774, this question is applied to conditions not seriously dissimilar to the conditions confronting us:

> "What the Mennen Company has done, was to allow to 'wholesalers' who purchased a fixed quantity of their products a certain rate of discounts while to the 'retailers' who purchased the same quantities it denied the discount rates allowed to the 'wholesalers.' This does not indicate any purpose on the part of the Mennen Company to create or maintain a monopoly. The company is engaged in an entirely private business and it has a right freely to exercise its own independent discretion as to whether it will sell to 'wholesalers' only or whether it will sell to both 'wholesalers' and 'retailers,' and if it decides to sell to both it has a right to determine whether or not it will sell to the 'retailers' on the same terms it sells to the 'wholesalers.' It may announce in advance the circumstances, that is the terms, under which it will sell or refuse to sell."

We might well content ourselves with the soundness of our position upon the legal question just presented. The act of the respondent did not violate the law in any particular. The respondent simply declared its surprise at the change in sales policy of the T. A. Snider Preserve Company and announced that if it had known

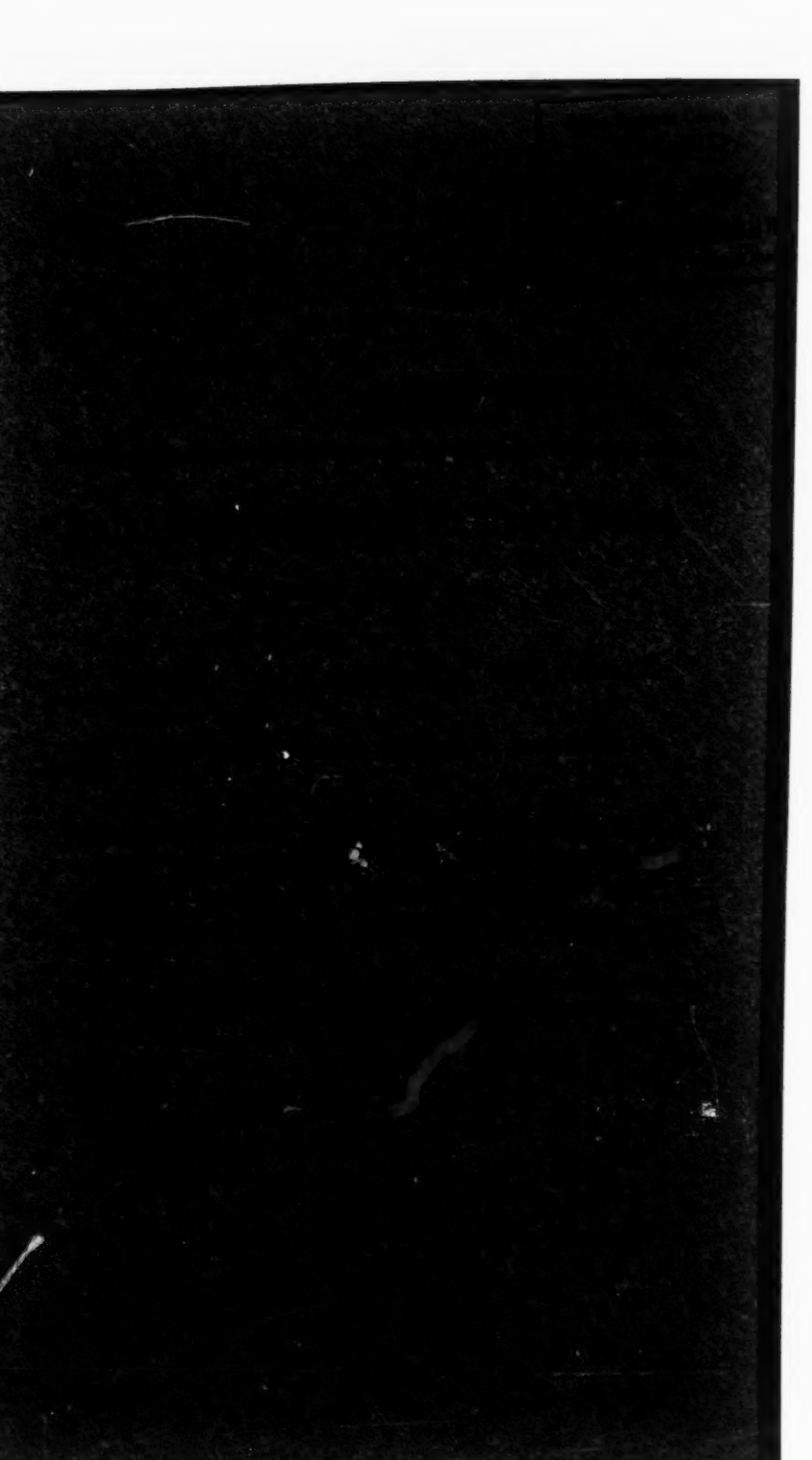
of such a change that it would not have purchased the merchandise in question. In other words, respondent simply exercised its right to select the manufacturer from which it would purchase and had the temerity to announce its reason publicly. If respondent had the lawful right to decline to purchase the T. A. Snider Preserve Company products for this reason, and if it also had the right to announce the reason there is no necessity of attempting to find a further justification.

In *Journal of Commerce Publishing Company* v. *Tribune Company*, 286 Fed. 112, the following quotation is rather pertinent:

> "When one's acts are wholly within the law, he needs no additional justification in court. But the record in this cause exhibits a strong moral ground for the Tribune Company to insist upon its legal rights with the carriers. During long years the Tribune Company devoted great attention and spent large sums in building up a carrier system through which its papers could promptly and reliably be distributed to subscribers. By means of premiums and various advertising methods it secured new subscribers and furnished their names and addresses to the nearest Tribune carrier. In territory where the business was not large enough to pay a carrier for delivering the papers, it paid the carrier until the difference between the established buying and selling prices of the papers would afford satisfactory pay. For these and many other similar expenditures of effort and money, each carrier, through owning his own 'route' and buying outright from day to day his copies of the paper, recognized that the Tribune Company had at least a moral right to a voice in controlling the methods and personnel of the carriers."

We believe this entire controversy is free from public interest and that the petition should be dismissed.

EMMET TINLEY,
W. E. MITCHELL,
D. L. ROSS,
EDWIN D. MITCHELL,
Counsel for Raymond Bros. Clark Company, Respondent.



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AUTHORITIES CITED.

ing any manufacturer or producer of, or dealer in such commodities, in the course of such commerce, in or from the selection of customers, or influencing or attempting to influence any manufacturer, producer of, or dealer in such commodities, in the course of such commerce, not to accept as a customer anyone whom such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

THE FACTS.

The respondent, a Nebraska corporation, is engaged in the business generally known as that of a wholesale grocer, with principal place of business at Lincoln, Nebraska. On October 28, 1919, a complaint was issued by the Federal Trade Commission, under and by virtue of the provisions of section 5 of the act of Congress approved September 26, 1914, known as the Federal Trade Commission act (28 Stat. 717, c. 311), in which complaint it was charged that respondent had hindered or attempted to prevent the Basket Stores Co., a competitor, in or from the purchase of groceries and like commodities direct from manufacturers or producers, and had hindered or attempted to prevent the T. A. Snider Preserve Co. from selling and delivering food products manufactured by it to said Basket Stores Co., or from selecting or accepting said Basket Stores Co. as a customer in the sale and distribution of its products. After service of the complaint respondent made answer thereto in writing, whereupon testimony of witnesses was taken, both

in support of the charges stated in the complaint and in opposition thereto, and the matter was submitted to the commission on the complaint, answer, testimony, briefs, and oral argument; and thereafter, on February 23, 1921, the commission, being of the opinion that the methods of competition in question were prohibited by the act, made its report in writing in which it stated its findings as to the facts, and issued and served on respondent an order requiring it to cease and desist from such methods of competition.

The respondent and the Basket Stores Co. each did a volume of business aggregating $2,500,000 in the year 1919. At the time of and before the issuance of said complaint the Basket Stores Co. had its principal place of business at Omaha, Neb., and maintained a warehouse at Lincoln, Neb., and had 72 retail stores at Omaha, Lincoln, and at other points in the States of Nebraska and Iowa. It purchased substantially all of its supplies direct from manufacturers in States other than Iowa in carload lots or in quantities equivalent to those in which wholesale grocers generally purchased their supplies. Of the commodities distributed by the Basket Stores Co. approximately 10 per cent of the total were sold to retail stores outside its own organization and to restaurants and hotels in wholesale quantities, and approximately 90 per cent of the total of such commodities were sold to the consuming public through the retail stores operated by it.

On October 4, 1918, there was shipped from Marion, Indiana, by the T. A. Snider Preserve Co., a carload of food products, orders for which had been taken

from six customers located at Lincoln, Nebr., and adjacent points. That part of the shipment sold to the Basket Stores Co. weighed only 16,251 pounds, or less than the minimum carload, and by combining these goods with those purchased by the five other customers the aggregate weight was over 61,000 pounds, or more than a minimum carload, which gave the consignees the benefit of the carload freight rate, which is substantially less than the rate would have been for a shipment of less than a carload. As was the custom in such cases, the goods were shipped in what is known as a "pool" car, which was consigned to respondent, and the invoice of the contents of the car was sent to respondent, showing the items purchased by each of the six customers. Of the six consignees, five were members of the Iowa-Nebraska Wholesale Grocers' Association, and about whose right to purchase in wholesale quantities direct from manufacturers respondent made no contention, but when it ascertained that a portion of the goods, or more than 26 per cent of the total weight, was consigned to the Basket Stores Co., it immediately protested to the Snider Company in a letter dated October 8, 1918, and expressed surprise that the goods had been sold to the Basket Stores Co. direct, and the claim was made that the Basket Stores Co. was nothing but a retail store, and a demand was made for a credit slip for the regular jobber's profit on the goods sold to the Basket Stores Co. No response was made by the Snider Company to this demand, and on October 22 two letters were written to the Snider Company by

respondent requesting advice as to the amount it should charge for unloading, checking out, and reshipping the contents of the car, and advising the Snider Company of the distribution of the contents of the car, some of which had been received in bad order and was turned back to the railroad company.

The car reached Lincoln, Nebr., on October 10, 1918, and was "spotted" at the warehouse of the respondent the next day, and some time between October 11 and October 16 the car was unloaded and that portion of the goods going to Beatrice and Nebraska City had been reshipped to these points and the goods which had arrived in bad order were turned back to the railroad company, but the Basket Stores Co. was not notified of the arrival of the goods until November 15 following, or 35 days after the car had been "spotted." The goods consigned to the Basket Stores Co. remained all this time in the warehouse of respondent, although the Basket Stores Co. was greatly in need of the goods to supply its trade. In remitting to the Snider Company for the goods purchased by it, respondent deducted from the amount of the bill $100 which it designated as "Commission on Basket Stores." A controversy arose over this charge between the Snider Company and the respondent, and on December 16 following respondent wrote to Snider Company again, in which letter it sought to justify its action in deducting the $100, and reiterated its claim that the Basket Stores Co. did only a retail business and did not operate a wholesale store, and the statement was made that

if respondent had known that the Snider Company had accepted an order from the Basket Stores Co. direct, the Snider Company would never have had a dollar's worth of business from respondent, and that, unless its claim for $100 commission from the Basket Stores Co. shipment were allowed, it desired the Snider Company to give it shipping instructions for all Snider Company products in the possession of respondent. In January, 1919, Mr. T. A. Davis, sales manager for the Snider Company, called on respondent to end, if possible, the controversy which had arisen over the $100 commission, but did not succeed.

THE QUESTIONS PRESENTED.

1. Whether or not the practices of respondent, as set out herein (ante, pp. 2–6), constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal Trade Commission act (38 Stat. 717, c. 311).

2. Whether a trader, by threats of withdrawal of patronage or other means, acting alone and not in combination with others, may induce, coerce, or attempt to induce or coerce, a manufacturer or producer of groceries and related commodities to refuse to sell its products to a competitor of such trader, thereby hindering or preventing such competitor in or from the purchase of supplies necessary for the conduct of its business.

3. Whether a trader, by threats of withdrawal of patronage, or by other means, acting alone and not

in combination with others, may induce, coerce, or attempt to induce or coerce, a manufacturer or producer of or dealer in groceries and related products not to accept as a customer a competitor of such trader, which competitor such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

REASONS FOR THE ALLOWANCE OF THE WRIT.

Speaking broadly, this case is one of many arising out of the effort to establish a more direct system of distributing the products of factory and farm to the consumers thereof. The movement has manifested itself in the establishment of cooperative organizations among dealers for purchasing directly from manufacturers, cooperative selling organizations among farmers, mail-order houses, chains of retail stores, etc. To the extent to which the movement is successful it will diminish the profits of those through whose hands the commodities have heretofore passed, and it has, therefore, from the first met the organized and individual opposition of established dealers, retail and wholesale. (*Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600, *National Harness Manufacturers' Association* v. *Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers' Assn. of El Paso, Texas, et al.* v. *Federal Trade Commission*, 277 Fed. 657.)

The instant case involves the efforts of a corporation operating a chain of retail grocery stores

to purchase in wholesale quantities directly from manufacturers.

If a chain of retail stores should be able to get its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores could sell commodities to the purchasing and consuming public at prices below those made by stores through which commodities are distributed from manufacturer, to wholesaler, to retailer; and the public is entitled to any benefits which may be derived from a direct method of distribution by manufacturers or producers to retailers; and if a jobber should prevent a manufacturer from distributing its products direct to the retailer by threats of the withdrawal of patronage or by other unfair means, it is submitted that such practices constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal trade act. A manufacturer should be free to select either of these methods of distribution, or to employ both. The considerations which govern his decision in this matter will presumably be the relative profitableness of these different methods, and this, in turn, is affected chiefly by the volume of business obtainable by using one or the other, or employing both. It may be argued by jobbers that the most economical method of distribution is through the wholesaler and the retailer to the consumer, but the assumptions lying back of this

theory are not always sound. The actual facts are that this depends almost entirely upon a quantity position. It may be to the interest of the manufacturer in certain cases to sell through the wholesaler because of the size of the wholesaler's orders, because the sales effort required to sell a given volume of goods through the wholesaler is much less than that which must be made to sell the same volume direct to retailers, owing solely to the fact that the usual wholesale order is much larger than the usual order given by a retailer; but with the development of large-scale retailing, particularly the mail-order house, chain stores, and cooperative retail associations the situation has changed, and the Basket Stores Co. was able to and did purchase its supplies in quantities fully as large as those in which wholesalers generally purchased their supplies, and as a result the Basket Stores Co., in the retail branch of its business, absorbed the profit formerly obtained by the wholesaler and was able to pass it along to the consuming public.

The court below based its judgment wholly upon the principle that the respondent had a positive and lawful right to select any particular merchandise which it wishes to purchase and to select any person from whom it might wish to make its purchases and discontinue dealing with any manufacturer, but the gist of the charges stated in the complaint, and the particular practice from which respondent was required to cease and desist, was its

interference with a competitor by cutting off its source of supply, by inducing or attempting to coerce a manufacturer to cease selling its product to such competitor; the order issued by the commission in no way directed respondent to purchase supplies from any particular manufacturer, but merely requires it to quit interfering with trade relations which one of respondent's competitors had established with a given manufacturer, which relations were satisfactory to both parties.

The court below apparently was influenced in reaching its conclusion by the fact that respondent was acting alone and not in combination with others, possibly confusing the provisions of section 5 of the commission act with the provisions of the Sherman Act, which prohibit combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, and overlooked the fact that the commission act makes unlawful all unfair methods of competition in commerce, and directs the commission to prevent *individuals* from using such methods.

The judgment of the court below is, therefore, in direct conflict with the recent decisions of this court in which it was held in effect that all practices which are offensive or which have a dangerous tendency, unduly to hinder competition, are unlawful, and may be prevented by a proceeding under section 5 of the commission act.

It is important that it be determined as early as practicable whether methods of the character here

used may lawfully be employed to prevent modification in the present system of distribution.

Wherefore it is respectfully submitted that the petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Eighth Circuit be granted.

JAMES M. BECK,
Solicitor General.
W. H. FULLER,
Chief Counsel, Federal Trade Commission.

BRIEF.

The facts found by the commission constitute an unfair method of competition.

The substantive law of section 5 of the Federal Trade Commission act is found in the following paragraph:

> That unfair methods of competition in commerce are hereby declared unlawful.

Free and fair competition is the affirmative and positive principle upon which our industrial and, in turn, our social system is based. The competitive system is justified upon the postulate contained within it that, as a result of the operation of free and fair competition, there results to the unit the highest possible degree of reasonable return and to the public the best in quality and service at the lowest price. And so the law in its present state places monopoly at the opposite pole to free and fair competition. But seeing the necessity for prevention of monopoly as well as its punishment attempt at monopoly was also included in the Sherman Act. Looking still further in the field of prevention, it appeared that the way from free and fair competition toward monopoly led through restraint of trade, which was also prohibited by the Sherman Act if accomplished through the medium of contract, combination, or conspiracy. But experience proved that, either because of the limited condemnation of methods by the Sher-

man Act or because it did not go far enough into the field to protect free and fair competition in the initial stages of departure from these principles, the law had not been effective, and Congress took two steps forward by the trade commission act. It threw off all limitations as to methods and amplified its definition of the unlawful departure from free and fair competition. Monopoly and restraint of trade are still under the legal ban, but the scope of preventive measures has now been advanced in the anticipatory field to check the movement away from free and fair competition at the stage of unfair competition. The causes impelling this advance are summarized in the dissenting opinion of Mr. Justice Brandeis in the *Gratz* case.

This court outlined the meaning of the phrase "unfair methods of competition" in the *Gratz* case, as follows:

> The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or *as against public policy because of their dangerous tendency unduly to hinder competition* or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

Again in *Federal Trade Commission* v. *Beech-Nut Packing Company* (42 Sup. Ct. Rep. 150) this court held the "Beech-Nut system of merchandising" to be an unfair method of competition because of its effect to restrict competition; subsequently, in *Federal Trade Commission* v. *Winsted Hosiery Company* (42 Sup. Ct. Rep. 384) the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the methods being its deceptive character.

The two decisions last above referred to firmly establish the criteria for the interpretation of the act to be that applied in the *Gratz* case. It is contended that the practice attacked by the commission in this case is unfair and unlawful because of its dangerous tendency to hinder competition, because of its oppressive character, and because of its unlawful character when tested by common-law criteria which, it appears, are to be applied to the construction of the Federal Trade Commission act.

The practice here questioned, when used by the members of a trade association acting in cooperation, violates the Sherman law.

It is well established that the circulation among members of an association of retail dealers of the names of wholesalers engaged in interstate commerce selling direct to consumers, with the obvious purpose of having such retail dealers refrain from dealing with the wholesalers whose names appear on the list, constitutes an unwarranted obstruction and

interference with interstate commerce. (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600.)

Referring to the decision in the *Eastern States* case, the Supreme Court, in *Duplex Printing Press Company* v. *Deering* (254 U. S. 443, 467), says:

> In *Eastern States Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600), wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe* (235 U. S. 522, 534): "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."
>
> It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the

> participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Under the trade commission act the interference with interstate commerce is unlawful whether the method is employed by one or by many. No contract, combination, or conspiracy need be present, as in proceedings under the antitrust act, but a method which has the prohibited result, i. e., dangerous tendency unduly to hinder competition, is unlawful if employed by any person, partnership, or corporation.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Company, and that for the direct purpose of destroying such interstate traffic petitioner sought to induce the Snider Company to cease selling its products to the Basket Stores Company. Obviously, if petitioner's efforts had been successful, there would have been no more sales by the Snider Company to the Basket Stores Company, and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Company would have been restrained. (See *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38.)

Method employed oppressive within the Gratz decision.

The method used by the petitioner not only is calculated to hinder competition and therefore falls within the second class of practices condemned by the statute, but also is characterized by oppression as that term is used in the decision in the *Gratz* case. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce, upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

If the method is unfair because calculated to have the consequences set forth, it is no defense that the record does not disclose that such consequences have already resulted from its use.

In the *Sears-Roebuck* case (258 Fed. 307) the Court of Appeals for the Seventh Circuit says:

> The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge

> of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases.

Similarly, in the *National Harness Manufacturers* case (268 Fed. 705), the court says:

> In view of what has appeared, the criticism of lack of public injury is without force. The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores right at common law to a free market.

It is submitted that on principle the conduct of the petitioner constituted an unlawful interference at common law with the right of the Basket Stores Company to enter the business of a wholesale and retail dealer and to have business relations with any and all persons willing to deal with them. In a long line of decisions it has been held that business men may not combine to prevent others from having business relations with whom they will. In many cases, however, the element of combination or concerted action is not the ground of the decision. In civil cases involving conspiracy, the gist of the action is in most jurisdictions held to be the damage resulting from unlawful acts and not the conspiracy

itself, and it has sometimes been expressly held that the means employed to prevent persons from purchasing or selling goods were in themselves actionable.

Martell v. *White* (185 Mass. 255) was an action of tort based upon an alleged conspiracy to injure the plaintiff in his business. The defendants were members of a voluntary association of manufacturers, quarriers, and polishers of granite, one of the by-laws of which association provided that any member having business transactions with any party or concern not a member thereof, and in any way relating to the cutting, quarrying, polishing, buying, or selling of granite, should for each such transaction contribute at least $1.00 and not more than $500.00 to the support of the association. The plaintiff in that case was a quarrier of granite and had enjoyed a large business with some of the members of the association. As a result of fines ranging from $10.00 to $100.00 imposed on such members for dealing with him, the plaintiff's business was practically destroyed. Passing the question of the legality of the objection of the association and considering the means employed to effectuate its objects, the court held that to compel members of the association to refrain from dealing with the plaintiff by means of fines was unlawful and not justified by competition, saying in part:

> In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened

> injury to their property. It is true that one may leave the association if he desires, but if he stay in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. * * *
>
> In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

In *Brown & Allen* v. *Jacobs Pharmacy Company*, (115 Ga. 429, (1902), it was held that an association of retail druggists, formed for the purpose of maintaining prices and which sought to prevent any druggist who did not maintain prices from securing supplies, was unlawful and that an injunction would lie, at the instance of a dealer whose purchases of drugs from wholesalers were sought to be prevented,

restraining the members of the association, among other things, from "in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter, and from conspiring and from seeking to prevent wholesalers or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff."

In the course of the opinion the court summarized several decisions relied on as follows:

> In *Reg.* v *Druitt* (10 Cox Cr. Cas. 593) it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. * * * In *Olive* v. *Van Patten* (1894) (7 Texas Civ. App. 630), where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff—a sawmill owner and dealer who was not a member—to join such association and his exercising the right to sell to others than

> dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury, it was held to state a good cause of action for damages and injunction. * * *
>
> In *Jackson* v. *Stanfield* (1894) (137 Ind. 592) it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or lose the business of the members of such combination, was unlawful, and rendered a member who procured action by the association to the injury of brokers liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person.

In some of the cases cited by the court in the *Brown & Allen* case, *supra*, the element of combination was involved in the decision, while in others the *ratio decedendi* is not very clear. In this line of cases as a whole, however, there is constant reference to the right of the plaintiff to conduct his business free from the interference of others. The definition of this right and the duty of others not to invade it is not to be found in many of the decisions. But in *Booth & Bro.* v. *Burgess* (72 N. J. Eq. 181), Vice Chancellor Stevenson, brushing aside all questions of combination, of malicious injury, of the wrongful or

unlawful character of the particular means, and of the limits of the justification of self-interest, harks back to the basic principle of all tort actions and seeks to ascertain what right of the plaintiff has been invaded and what is the correlative duty of the defendant. He concludes that in such cases the right of the plaintiff is "the right to a free market." The court says in part:

> The primary legal right, which it seems to me should be recognized as belonging to the complainant in the case, may be defined or described as the *right to a free market*. * * *
>
> We have the right to a free market, which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect. Thus recognition is accorded to the "interest which one man has in the freedom of another." (*Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759.)
>
> The tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of *freedom* to deal with him on the part of all who may voluntarily desire to deal with him. * * *
>
> A fourth right, or a wide extension of the right above defined as the right to a free market, has undoubtedly been involved in if not expressly recognized by the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a free market but a market where transactions occur

> naturally according to the ordinary laws of trade and commerce, unaffected not only by coercion but also by persuasions or non-coercive inducements from outside parties applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage.

Whether this right to a free market be invaded by one or by many, it is equally actionable. In *Booth & Bro.* v. *Burgess*, supra, the court points to Lord Lindley's expression in *Quinn* v. *Leathem* (A. C. 495, 534, (1901):

> One man exercising the same control over others, as these defendants do, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong toward the plaintiff for which the plaintiff could have maintained an action.

Respecting the wrongful character of the invasion of one's right to a free market by a single individual Sir Frederick Pollock, in his "The Law of Torts" (Tenth edition, p. 163), says:

> And since a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so (Lord Lindley in *Quinn* v. *Leathem*), it follows that coercing a man's workmen or customers not to work for or deal with him (as distinguished from refusing to deal with him one's self) is not an exercise of one's own right but a violation of his and actionable if willfully done to his damage. Such a thing is more likely to be done, and likely to be more

injurious if done by several persons than by one, but on principle it would seem immaterial if there be one wrongdoer or several.

An expression from a decision by the Court of Appeals of the State of New York in a recent case, *Auburn Draying Co.* v. *Wardell* (227 N. Y. 1, (1919), appears to be clearly in accord with the *Burgess* case, *supra*, and with the opinion expressed by Pollock in the excerpt quoted. The New York court said:

> But there is an important and perceptible distinction, in the realms of justice, civil order, and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion, or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop, and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he can not lawfully prevent, through fraud or other form of dishonesty, or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he can not lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the

> others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would, did he intentionally disable the other or his industrial resources.

In the instant case the Basket Stores Company had the right at common law to purchase from and to sell to all persons who were willing to have business relations with it; and had the further right to have all persons willing to trade with it left free to do so.

The fact that it combined the business of wholesaling and retailing was not a penalty and was not unlawful, as was held by the court (C. C. A. 5th Ct.) in the case of *Wholesale Grocers Association of El Paso, Texas, et al.* v. *Federal Trade Commission* (277 Fed. 657 at 664). When the petitioner sought to compel or coerce the Snider Company not to sell to the Basket Stores Company, and demanded a commission for itself or for some other wholesaler on sales by the Snider Company to the Basket Stores Company, it invaded the Basket Stores Company's legal right to a free and uncoerced market. Its refusal to purchase from the Snider Company if it continued relations with the Basket Stores Company, coupled with the demand that in the event the Snider Company continued such relations it should take back from the petitioner all goods of its manufacture in its warehouses, was a further effort to coerce the Snider Company to refrain from business relations with the Basket Stores Company and was an actionable wrong against the latter company.

It matters not whether the effort to prevent the Basket Stores Company from purchasing as it saw fit was carried out by the petitioner alone or in association with or collusion with others, it was equally a violation of the Basket Stores Company's legal rights and of the right of the public to have the benefit of the competitive prices of the Basket Stores Company based on purchases of that company in an open and free market.

The purpose of the trade commission act was to insure to all business men and to the public the continuance of free and fair competition in a free and open market. The effort to prevent the Basket Stores Company from purchasing the subjects of commerce was coercive in its character and clearly oppressive within the interpretation of section 5 of the trade commission act.

There is here no question of the right of the respondent to deal or refrain from dealing with the Snider Company. The question is as to its right to prevent the Basket Stores Company from purchasing from those willing to sell to it. Whatever may be the right of the respondent in its relation with the Snider Company, it does not have a right to interfere with business of third parties by coercing the conduct of the Snider Company toward them. Confusion is introduced into these cases by the assumption that because a man may contract or refrain from contracting with a person he may injure the business of a third party by conduct which, if the rights of no third party intervened, might be lawful.

There was an illegal interference with established business relations.

The Basket Stores Company, having established business relations with the Snider Company satisfactory to both parties, had a legal right to have that relation respected by others, although the continuance of the relation was not secured by contract. In *Truax* v. *Raich* (239 U. S. 33, 38), this court says:

> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will.

Again, in *Hitchman Coal & Coke Co.* v. *Mitchell et al.* (245 U. S. 229, 252):

> In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to deal with him. The value of the relation

> lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.
>
> See also *International News Service* v. *The Associated Press* (248 U. S. 215, 236) and *American Bank & Trust Co.* v. *Federal Reserve Bank* (41 Sup. Ct. Rep. 499).

It is not fair competition to seek to destroy a competitor by preventing him from obtaining merchandise.

> Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.
>
> *Hitchman Coal & Coke Co.* v. *Mitchell et al* (245 U. S. 259).

The law of competition affords no sufficient justification for acts of interference of the character here

involved. (*Martell* v. *White*, supra, p. 19; *Hitchman Coal & Coke Co.* v. *Mitchell*, supra, and cases cited in that decision.)

In the *Gratz* case this court held that practices contrary to good morals because characterized by deception, bad faith, fraud, or oppression were within the prohibition of the statute. These are common-law criteria of interpretation. By parity of reasoning competitive methods which are by common-law tests actionable wrongs are also prohibited. It is inconceivable that Congress, when seeking to purge interstate commerce of unfair methods, did not intend to include within its prohibition tortious or otherwise unlawful methods. Not that all unlawful acts are unfair methods of competition, but that competitive acts immediately connected with interstate commerce which are contrary to established principles of lawful competition are also within the prohibition of the statute. If this be correct, the foregoing presentation of common-law principles, it is submitted, sufficiently establishes that the methods employed in this instance were unfair.

It is submitted that the decision should be reviewed and the commission's order affirmed.

JAMES M. BECK,
Solicitor General.

W. H. FULLER,
Chief Counsel Federal Trade Commission.

——— ———,
ADRIEN F. BUSICK,
Attorneys for Federal Trade Commission.

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FEDERAL TRADE COMMISSION *v.* RAYMOND BROS.-CLARK COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 102. Argued November 27, 1923.—Decided January 7, 1924.

In the absence of any element of conspiracy, monopoly or oppression, a wholesale dealer, in interstate commerce, has a right to stop dealing with a manufacturer if he thinks that the manufacturer is undermining his trade by selling to a competing wholesaler or to a retailer competing with his customers; and such conduct is not an unfair method of competition within the meaning of the Trade Commission Act. P. 572.

280 Fed. 529, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which set aside an order of the Federal Trade Commission.

Mr. Adrien F. Busick, with whom *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* were on the brief, for petitioner.

The decision of this Court in *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421, interpreted the substantive law of the Trade Commission Act as creating two classes of practices which are unfair within the meaning of the statute, first, those which are contrary to good morals because characterized by deception, bad faith, fraud, or op-

pression, and, second, those which have a dangerous tendency unduly to hinder competition. Subsequently, in *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, this Court held the "Beech-Nut System of Merchandising" to be an unfair method of competition because of its effect to restrict competition. Again, in *Federal Trade Comm.* v. *Winsted Hosiery Co.*, 258 U. S. 483, the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the method being its deceptive character. These decisions firmly establish the criteria for the interpretation of the act.

This proceeding involves "involuntary" restraints of trade; and control of the market by respondent need not be shown. *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S. 274; *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502; *Steers* v. *United States*, 192 Fed. 1.

The practice burdens interstate commerce, hinders competition, and destroys that equality of opportunity to compete which it was the purpose of the Trade Commission Act to preserve. *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Duplex Co.* v. *Deering*, 254 U. S. 443.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Company, and that for the direct purpose of destroying such traffic petitioner sought to induce the Snider Company to cease selling its products to the Basket Stores Company. Obviously, if respondent's efforts had been successful, there would have been no more sales by the Snider Company to the Basket Stores Company, and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Company would have been restrained. See *Swift & Co.* v. *United States*, 196 U. S. 375; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

The methods employed were oppressive within the *Gratz Case*. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

Such methods destroy that equality of opportunity to compete in business which it was the great purpose of the Trade Commission Act and of cognate statutes to preserve. *United States* v. *American Oil Co.*, 262 U. S. 371; *United States* v. *Freight Assn.*, 166 U. S. 290; *United States* v. *International Harvester Co.*, 214 Fed. 987.

Traders should have large freedom of action in the conduct of their own affairs. *Federal Trade Comm.* v. *Curtis Pub. Co.*, 260 U. S. 568; *Federal Trade Comm.* v. *Sinclair Refg. Co.*, 261 U. S. 463. But the line which separates fair competition from that which is unfair is clear. *Hitchman Coal Co.* v. *Mitchell*, 245 U. S. 229; *American Bank & Trust Co.* v. *Federal Reserve Bank*, 262 U. S. 643; *Sears-Roebuck Case*, 258 Fed. 307; *National Harness Manufacturers Case*, 268 Fed. 705.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores' right at common law to a free market. *Martell* v. *White*, 185 Mass. 255; *Brown & Allen* v. *Jacobs Co.*, 115 Ga. 429; *Booth* v. *Burgess*, 72 N. J. Eq. 181; *Quinn* v. *Leathem*, (1901) A. C. 495; Pollock, The Law of Torts, 10th ed., p. 163; *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1; *People* v. *Butler*, 221 Mich. 626.

No question of respondent's right to refuse to deal with others is involved in this case.

There was an illegal interference with established business relations. *Truax* v. *Raich*, 239 U. S. 33, 38; *Hitchman Coal Co.* v. *Mitchell*, 245 U. S. 229, 252.

The practice being inherently illegal, no tendency to monopoly need be proven.

The existence of public interest in the case has been committed by the statute to the Commission as a matter preliminary to the issuance of a complaint and moving it to action or nonaction. There is ample public interest here.

Mr. Emmet Tinley, Mr. W. E. Mitchell, Mr. D. L. Ross and *Mr. Edwin D. Mitchell* appeared for respondent.

Mr. Justice SANFORD delivered the opinion of the Court.

This writ brings up for review a decree of the Circuit Court of Appeals which set aside an order of the Federal Trade Commission requiring the Raymond Bros.-Clark Company to desist from a method of competition held to be prohibited by the Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717.

By § 5 of that act "unfair methods of competition" in interstate commerce are declared unlawful, and the Commission is empowered and directed to prevent their use.

The Commission, in January, 1920, issued a complaint charging the Raymond Company with acts and practices the purpose and effect of which were to cut off the supplies purchased by the Basket Stores Company, a competitor, from the T. A. Snider Preserve Company, stifle and prevent competition by the Stores Company, and interfere with the right of the Stores Company and the Snider Company to deal freely with each other in interstate commerce. The Raymond Company answered, and evidence was taken. The Commission made a report, stating its findings of fact and conclusions.

The material facts shown by the findings are: The Raymond Company and the Stores Company are dealers in groceries, with their principal places of business and warehouses in Nebraska. They buy groceries in wholesale quantities from manufacturers in other States, which are shipped to their warehouses and resold to customers within and outside of Nebraska. Each does an annual business of approximately $2,500,000. The Raymond Company sells exclusively at wholesale. The Stores Company operates a chain of retail stores, but also sells at wholesale. In its wholesale trade, which constitutes about ten per cent. of its total business, it is a competitor of the Raymond Company. The Snider Company is a manufacturer of groceries, with its office in Illinois. In September, 1918, it sold groceries to the Raymond Company, the Stores Company and other neighboring dealers. These groceries were shipped in interstate commerce in a "pool" car to the Raymond Company, for distribution among the several purchasers.[1] The Raymond Company, upon thus learning of the sale to the Stores Company, delayed the delivery of its portion of the groceries, to the hindrance and obstruction of its business, and wrote to the Snider Company, protesting against the sale direct to the Stores Company and asking for the allowance of the jobber's profit on such sale.[2] Later, the Raymond Company declined to pay the Snider Company until this commission was allowed, and threatened to cease business with it and return all goods purchased from it then

[1] The facts that the Snider Company's office is in Illinois and that it shipped these groceries in interstate commerce, are not stated in the findings; but they otherwise appear in the record and are not disputed.

[2] It otherwise appears from the record that the ground of its protest and claim was its assertion that the Stores Company was "nothing but a retail store."

in stock, unless it allowed this commission and discontinued direct sales to the Stores Company; and, thereafter, an attempted settlement of the controversy having failed, the Raymond Company ceased to purchase from the Snider Company.

The conclusions of the Commission were: that the conduct of the Raymond Company tended to, and did, unduly hinder competition between the Stores Company and others similarly engaged in business; that the purpose of the Raymond Company was also to press the Snider Company to a selection of customers, in restraint of its trade, and to restrict the Stores Company in the purchase of commodities in competition with other buyers; and that the conduct of the Raymond Company tended to the accomplishment of this purpose.

The Commission thereupon adjudged that the method of competition in question was prohibited by the act, and ordered the Raymond Company to desist from directly or indirectly—hindering or preventing any person, firm, or corporation in or from the purchase of groceries or like commodities direct from the manufacturers or producers, in interstate commerce, or attempting so to do; hindering or preventing any manufacturer, producer, or dealer in groceries and like commodities in or from the selection of customers in interstate commerce, or attempting so to do; and influencing or attempting to influence any such manufacturer, producer, or dealer not to accept as a customer any firm or corporation with which, in the exercise of a free judgment, he has, or may desire to have, such relationship.

Upon a petition of the Raymond Company for review of this order, the Circuit Court of Appeals held that the findings of fact did not show an unfair method of competition by the Raymond Company as to the Stores Company or others similarly engaged in business. The court said: "There is no finding that petitioner combined with

any other person or corporation for the purpose of affecting the trade of the Basket Stores Company, or others similarly engaged in business. So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchandise which it wished to purchase, and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it, or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, . . . for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right cannot be charged against petitioner as an unfair method of competition." The decree setting aside the order of the Commission was thereupon entered. 280 Fed. 529.

We pass, without determination, the preliminary contentions of the Raymond Company, that the findings of the Commission are not supported by the testimony, in many respects,[3] and that, as both the complaint and the findings of fact relate merely to a controversy between it and a single manufacturer, over a single shipment of merchandise, the broad order of the Commission, commanding it to desist from all acts of like character with "the

[3] The Raymond Company insists that the testimony shows, among other things, that it did not intentionally delay the delivery of the groceries to the Stores Company; that the Stores Company is not its competitor in the wholesale business, but engaged in the retail business, selling groceries to consumers in competition with other retail dealers to whom the Raymond Company sells at wholesale; and that it did not threaten the Snider Company with the withdrawal of patronage if it continued to sell to the Stores Company, but merely expressed surprise at the change made by the Snider Company from its former policy of selling only to wholesalers, and declared that it would not have made its own purchases had it known of this change.

entire commercial world" is improvident, and can not be sustained.[4]

The gravamen of the contention in behalf of the Commission is that the conduct of the Raymond Company, acting alone and not in combination with others, in threatening the withdrawal of patronage from the Snider Company if it continued to sell goods to the Stores Company, constituted an unfair method of competition, oppressive in its character, unlawful when tested by common law criteria, and having a dangerous tendency unduly to hinder competition.

The words "unfair method of competition," as used in the act, "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, 453. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods, must be preserved. *Federal Trade Comm.* v. *Gratz, supra*, p. 429.

The present case discloses no elements of monopoly or oppression. So far as appears the Raymond Company has no dominant control of the grocery trade, and competition between it and the Stores Company is on equal terms. Nor do we find that the threatened withdrawal of its trade from the Snider Company was unlawful at the

[4] The Circuit Court of Appeals stated, in the outset of its opinion, that, in any event, as the proceeding related to the use of an unfair method of competition against the Stores Company, the order of the Commission, being "as broad as the business world," would have to be modified, if sustained in any particular. See *Federal Trade Comm.* v. *Gratz*, 253 U. S. 421, and *Western Sugar Refinery Co.* v. *Federal Trade Comm.* (C. C. A.), 275 Fed. 725, 732.

common law, or had any dangerous tendency unduly to hinder competition.

It is the right, "long-recognized", of a trader engaged in an entirely private business, "freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. See also *United States* v. *Freight Assn.*, 166 U. S. 290, 320; *Dueber Watch-Case Co.* v. *Howard Watch Co.* (C. C. A.), 66 Fed. 637, 645; *Great Atlantic Tea Co.* v. *Cream of Wheat Co.* (C. C. A.) 227 Fed. 46, 48; *Wholesale Grocers' Ass'n* v. *Trade Comm.* (C. C. A.), 277 Fed. 657, 664; *Mennen Co.* v. *Trade Comm.* (C. C. A.), 288 Fed. 774, 780; *Booth* v. *Burgess*, 72 N. J. Eq. 181, 190; and 2 Cooley on Torts, (3d ed.) 587. Thus a retail dealer "has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself." *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 614; *United States* v. *Colgate & Co.*, *supra*, p. 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. *Eastern States Lumber Assn.* v. *United States*, *supra*, p. 614; *United States* v. *Colgate & Co.*, *supra*, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer "for reasons sufficient to himself." And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.

A different case would of course be presented if the Raymond Company had combined and agreed with other

wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Grenada Lumber Co.* v. *Mississippi, supra,* p. 440; *Eastern States Lumber Assn.* v. *United States, supra,* p. 614. See also *Binderup* v. *Pathe Exchange, ante,* 291.

We conclude that the Raymond Company in threatening to withdraw its trade from the Snider Company exercised its lawful right, and that its conduct did not constitute an unfair method of competition within the meaning of the act. The decree of the Circuit Court of Appeals is accordingly *Affirmed.*